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# The Cuban quarantine: an analysis of the justification offered by the United States.

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University of Washington

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THE CUBAN QUARANTINE:  
AN ANALYSIS OF THE JUSTIFICATION OFFERED BY THE  
UNITED STATES

Presented to the  
Graduate School of Public Affairs  
University of Washington

In partial fulfillment  
of the Requirements of Public  
Policy Course 532 and 533  
National Security Policy Formulation

by  
Eugene Lawrence Pollmann  
//  
June 1968

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## Introduction

On October 23rd, 1962, as a result of information received from intelligence sources<sup>1</sup> concerning the installation of Soviet surface-to-surface medium-range ballistic missiles in Cuba, the United States government proclaimed a quarantine on the island for the purpose of preventing any further importation of these missiles into Cuba and for procuring the removal of those already there.<sup>2</sup> The quarantine was put into effect by U.S. Naval Forces on October 24th, was denounced in the Security Council by Cuba as "an act of war,"<sup>3</sup> and by the Soviet Union as a "threat of war"<sup>4</sup> in violation of the United Nations Charter.

The result of the quarantine was a qualified success for the United States. The Soviet Union elected not to challenge the quarantine,<sup>5</sup>

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<sup>1</sup>Details are contained in an interim report by the U.S. Congress, Senate, Preparedness Investigating Subcommittee of the Committee on Armed Services, 88th Congress, 1st Session, on S. Res. 75 on The Cuban Military Buildup (Washington: Government Printing Office, 1963).

<sup>2</sup>Interdiction of the Delivery of Offensive Weapons to Cuba, Proclamation No. 3504, 27 Fed. Reg. 10401, reprinted in The Department of State Bulletin Vol. XLVII (November 1962), p. 717; hereinafter referred to as Interdiction Proclamation.

<sup>3</sup>Statement of Mr. Garcia Inchaustegui (Cuba), U.N. Security Council Official Records, 17th year, 1022nd Meeting (23 Oct. 1962), p. 22 (S/PV 1022).

<sup>4</sup>Statement of Mr. V.A. Zorin (USSR), U.N. Security Council Official Records, 17th year, 1022nd Meeting (23 Oct. 1962), p. 36 (S/PV 1022).

<sup>5</sup>Sixteen out of 18 Soviet dry-cargo ships enroute to Cuba, presumably those containing quarantined items, reversed course and returned to the Soviet Union. Briefing given by John Hughes, Defense Intelligence Agency, Department of Defense Appropriations for 1964, Hearings Before a Subcommittee on Appropriations, House of Representatives, 88th Congress, 1st Session, Part 1. February 6, 1963 (Washington: Government Printing Office, 1963), p. 13.



and the missiles were withdrawn. In exchange, the Soviet Union received a carefully worded pledge not to invade Cuba. The success of the operation did not, however, resolve the problem of its legality.

There was a fairly convincing prima facie case that the United States had broken the law. It had interfered with the well established principle of freedom of the seas by claiming the right of taking into custody any vessel which failed to submit to visit and search. By all appearances the disposition of naval vessels resembled a blockade.<sup>6</sup> Also, it had in contravention of Article 2(4)<sup>7</sup> of the U.N. Charter clearly announced that it would use force in case of failure or refusal to comply with the quarantine instructions.<sup>8</sup>

Two lines of defense against the prima facie charge of illegality were formulated. One was the plea of self-defense<sup>9</sup> and the other was the claim the quarantine was a legitimate regional peace-keeping action within the terms of the U.N. Charter. Along both these paths, however, there

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<sup>6</sup>Compare the operational features of the quarantine with the traditional law of blockade as set forth in Chapter I, Declaration Concerning the Laws of Naval Warfare, S. Doc. No. 563, 63rd Congress, 2nd Session, 1914.

<sup>7</sup>Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

<sup>8</sup>Interdiction Proclamation, loc. cit.

<sup>9</sup>Argument most powerfully advanced by Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," American Journal of International Law, Vol. 57 (July, 1963), 597.

were the legal trip wires of Articles 51<sup>10</sup> and 53(1)<sup>11</sup> respectively.<sup>12</sup>

The legal spokesmen of the United States, reserving their position on the question of self-defense, and after cutting through the restraint imposed by Article 53(1), contended that the quarantine did not contravene Article 2(4) "because it was a measure adopted by a regional organization in conformity with the provisions of Chapter VIII of the Charter."<sup>13</sup> Furthermore, they argued that the charge of illegal blockade was not relevant because there had been no assertion of a state of war or belligerency which is implicit in the rules of blockade.<sup>14</sup>

How did they arrive at these conclusions? How good is their argument? What implications does it hold for international law?

#### Statement of Purpose

The purpose of this research paper is to analyze the United States justification for the Cuban quarantine to determine: (1) how it was developed; (2) how well it sustains the legal validity of the quarantine; and (3) what precedent, if any, it established in international law.

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<sup>10</sup>Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if armed attack occurs. . . ."

<sup>11</sup>Article 53(1) states: ". . . no enforcement action shall be taken under regional arrangements or agencies without the authorization of the Security Council . . . ."

<sup>12</sup>G.S. Windass, "The Cuban Crisis and World Order," International Relations, Vol. III (April, 1966), 3. I am also indebted to Mr. Windass for most of the structure of these introductory remarks.

<sup>13</sup>Article by the Deputy Legal Adviser, Department of State, Leonard C. Meeker, "Defensive Quarantine and the Law," American Journal of International Law, Vol. 57 (July, 1963), 523.

<sup>14</sup>Ibid., p. 515

### Significance of Research

The major significance of this work is in the way it analyzes the justification as a developmental process. The usefulness of this approach is that it retains the contextual framework in which the decisions at each step were made thereby providing additional insight into the current status of the law.

### Limitations

Since so many non-legal facets of the incident are related directly or indirectly to the reasons why the particular mode of justification was adopted, no precise statement can be given with reference to the limitations which will be imposed on this study. In general, however, this paper will not attempt to delineate in any great detail the operation of the quarantine, nor discuss the diplomatic bargaining that preceded the settlement except for purposes of continuity.

### Organization of the Paper

The body of this paper is organized to support the hypothesis that the United States justified the quarantine as a regional peace-keeping operation under OAS authorization for the following series of reasons: (1) it was faced with an unprecedented threat to its security that required removal; (2) the removal could only be accomplished by the threat or use of force; (3) the United Nations could not have brought force to bear to relieve the threat; (4) the United States could bring force to bear in the form of a quarantine; (5) the United States desired to legitimize the use of force in order to improve the probability of acquiescence;

(6) the United States also desired to avoid Article 51 as authority for the quarantine so as not to set a precedent.

In order to secure OAS authorization and remain in conformity with Chapter VIII of the United Nations Charter, two conditions had to be fulfilled: A two-thirds vote of approval by the OAS members was required, and the obstacle of Article 53(1) had to be overcome.

Chapter I describes the relevant pre-crisis events. Wedged in between a principle of non-intervention and a Pan-Americanized Monroe Doctrine, the United States found its options extremely limited. As the Cuban military build up continued, frustrations piled up until the discovery of surface-to-surface missiles sparked the tension into open crisis.

Chapter II describes the considerations the EXCOM<sup>15</sup> went through in developing the United States case. The implications of the threat, the United Nations, the selection of quarantine, and the mode of legitimizing are all taken up in this chapter.

The results of the decisions made in the EXCOM are examined in Chapter III. The first condition in the hypothesis statement is met, and a description of the crisis events leading up to settlement is included.

In Chapter IV attention turns to an analysis of how the second condition is argued. United States legal spokesmen attempt to "prove" that the quarantine does not violate Article 53(1) effectively allowing the OAS to do its own policing without any control from the Security Council.

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<sup>15</sup>EXCOM; an abbreviation for Executive Committee of the National Security Council. That group of fourteen men who sat as Presidential advisers during the crisis. Names are listed in Theodore C. Sorensen Kennedy (New York: Bantam, 1966), p. 760.

Chapter V re-examines the generalization, arrives at conclusions concerning the major findings of the analysis, and discusses the precedential worth of the case for international law.

#### Acknowledgments

This author wishes to express his gratitude to H.C.L. Merillat, visiting Professor of Law, University of Washington Law School for his suggestions in the preparation of this work, and to Brewster C. Denny, Professor of Public Affairs, University of Washington, for his guidance, review, and assistance in its final production.

## CHAPTER I

### PRE-CRISIS EVENTS

The events prior to the outbreak of the crisis form an important backdrop to the development of this case. They describe a situation in which deteriorating United States-Cuban relations became increasingly worse as the Soviet Union embarked on an attempt to extend its influence into the Western Hemisphere. While the United States observed a policy of restraint, frustrations continued to grow, warnings were issued, and the limit of tolerance was finally reached.

#### I. UNITED STATES RELATIONS WITH CUBA AND THE OAS

##### The Objection to the Castro Regime

Basically, the fundamental objection of the United States to the Castro regime was strategic and military. It had been a long standing tradition in American foreign policy that Cuba should not become a base from which an extracontinental power could launch an attack against the United States. The dreaded prospect materialized when Castro aligned himself with the Soviet bloc.<sup>16</sup>

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<sup>16</sup>Ambassador Stevenson made this point clear in his address to the Security Council on 23 October 1962, stating that the crucial fact about Cuba was not that it was revolutionary, socialistic, or dictatorial, but that it had "given the Soviet Union a bridgehead and a staging area in this Hemisphere . . . ."

In 1958 the United States had indirectly assisted Castro in coming to power. Suspending arms shipments to the Batista government at a time when it was attempting to suppress the revolutionary movement, the United States appeared to welcome Castro and his promises of social and agrarian reform; but soon after Castro took office the cordiality began to disappear. Properties of United States citizens were confiscated or expropriated; Communist influence on the island was permitted to grow; and close diplomatic, economic, and military contacts were established with the Sino-Soviet bloc. In an atmosphere exacerbated by Castro's vehement attacks against the United States, diplomatic relations were terminated in January 1961.<sup>17</sup>

#### The Problem Faced by the United States

As the situation steadily worsened, the United States found itself in a quandry over how to resolve the problem Cuba posed to its security in view of a self-declared doctrine of nonintervention. In retaliation for confiscation of American properties, the Cuban sugar import quota was steadily reduced, and additional economic sanctions were applied in the hope that they would restrain Castro's hostile attitude towards the United States; however, the desired effect was largely offset by Soviet aid, and Castro became even more defiant. It soon became apparent that some other solution to the problem would be required, and in the latter part of 1960<sup>18</sup> a secret plan was formulated by the United States. Cuban exiles, eager

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<sup>17</sup>Events in United States-Cuban Relations, A Report Prepared by the Department of State for the Committee on Foreign Relations, United States Senate, 88th Congress, 1st Session, January 29, 1963 (Washington: Government Printing Office, 1963), pp. 1-15.

<sup>18</sup>The year 1960 is an estimate based on Roger Hilsman's statement that the Eisenhower administration armed and trained the Cuban refugee force. Mr. Hilsman was Director of Intelligence and Research of the Department of State during the Kennedy Administration. Roger Hilsman, To Move A Nation (Garden City, New York: Doubleday, 1967), p. 30.

to return to their homeland, went into training for an invasion of Cuba under CIA direction.<sup>19</sup> When the Kennedy Administration came into office, the plan was approved for execution. The result was the ill-fated Bay of Pigs invasion. United States complicity in the fiasco was exposed, and the result, as conservatively stated by Mr. deLessups S. Morrison, United States Representative to the OAS, was a loss of popular support for the United States in Latin America.<sup>20</sup>

#### United States Success in Rallying OAS Support

Up until the latter half of 1960, the Latin American members of the OAS were not really convinced that Cuba was not just an American obsession. But then an awareness that the Castro regime constituted a threat to their security began to emerge. By January 1962, a total of 13 of the OAS members had broken diplomatic relations with Cuba.

Commencing in August 1960, the Seventh Meeting of Foreign Ministers, meeting at San Jose, Costa Rica, approved the Declaration of San Jose, stating that the acceptance by an American state of extracontinental intervention endangered American solidarity and security.<sup>21</sup> Following this, on 26 April 1961, the Council of Delegates to the Inter-American Defense Board excluded Cuba from the classified sessions of the board

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<sup>19</sup>Ibid., pp. 30-39.

<sup>20</sup>United States Congress, House of Representatives-Committee on Foreign Affairs. Castro-Communist Subversion in the Western Hemisphere, Hearings before Subcommittee on Inter-American Affairs, 88th Congress, 1st Session, Feb - Mar 6, 1963 (Washington, GPO, 1963), p. 228.

<sup>21</sup>Events in United States-Cuban Relations, op. cit., p. 17.



"while the present and evident military alliance exists between Cuba and the Soviet bloc."<sup>22</sup> Then, early in 1962, the Eighth Meeting of Foreign Ministers, meeting at Punta del Este, Uruguay, gathered to affirm the incompatibility of Communism with the American System; to consider suspending all arms trade with Cuba; and to recommend exclusion of the Castro regime from the OAS. No serious resistance was encountered to the first and second matter, the third, however, was rejected by almost one third of the voting nations. The important opposition was not only due to the juridicial question of whether a member could be excluded without amendment to the Charter of the Organization,<sup>23</sup> or the fear of domestic repercussions from groups sympathetic to Fidelismo, but also as Robert N. Burr has noted, from the "reluctance to establish the precedent of ejecting a member at the behest of the United States."<sup>24</sup> But since a two-thirds vote was sufficient, the resolution was passed.

In the meantime, although a measure of success had been achieved in the OAS, it was not universally accepted by Congressmen in the United States as being completely adequate; and there emerged some strong doubts whether a traditional United States doctrine had not been compromised in exchange for a system of collective security.

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<sup>22</sup>Organization of American States, Annual Report 1961, p. 12

<sup>23</sup>Excerpts from Eighth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance Doc. 68 (1962).

<sup>24</sup>Robert N. Burr, Our Troubled Hemisphere, (Washington: The Brookings Institution, 1967), p. 28.

## II. DOMESTIC PRESSURES

At home the Administration came under constant pressure to do something about Castro. There was evidence of an increased Soviet arms buildup on the island<sup>25</sup> and public concern was intensifying. It was not, however, a case of "do nothing" as Senator Keating and others claimed. In February 1962, the President had made the embargo on trade with Cuba substantially complete;<sup>26</sup> and in the meanwhile, surveillance flights over the island kept a watchful eye out for any new development.

### Discovery of Surface to Air Missiles

On 29 August 1962, on a routine U-2 overflight, positive identification was established of a surface-to-air missile installation known as a SAM-2. Two sites were specifically located and six others were tentatively identified.<sup>27</sup> A close review of the entire military buildup prompted President Kennedy to draw the line of tolerable limit, and on 4 September he issued the following statement:

Information has reached this Government in the last four days from a variety of sources which establishes without doubt that the Soviets have provided the Cuban Government with a number of anti-aircraft defense missiles with a slant range of twenty-five miles which are similar to early models of our Nike.

There is no evidence of any organized combat force in Cuba from any Soviet bloc country; of military bases provided to Russia; of a violation of the 1934 treaty relating to Guantanamo;

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<sup>25</sup>The Cuban Military Buildup, op. cit., pp. 5-8.

<sup>26</sup>Cuba, Questions and Answers, Department of Defense Pamphlet GEN-2 dated 29 Oct 1962 (Washington: GPO, 1962), p. 3.

<sup>27</sup>Briefing given by Robert S. McNamara, Secretary of Defense. United States Congress, House of Representatives, Committee on Appropriations, Department of Defense Appropriations for 1964, Hearings before a Subcommittee of the Committee of Appropriations, 88th Congress, 1st Session, Feb. 6, 1963 (Washington: Government Printing Office, 1963), p. 3.

of the presence of offensive ground-to-ground missiles; or of other significant offensive capability either in Cuban hands or under Soviet direction and guidance. Were it to be otherwise the gravest issues would arise.

It continues to be the policy of the United States that the Castro regime will not be allowed to export its aggressive purposes by force or the threat of force. It will be prevented by whatever means may be necessary from taking action against any part of the Western Hemisphere.<sup>28</sup>

### Significance of the President's Statement

In the statement above what the President did was to issue a warning. He was "justifying not acting up to a certain point;"<sup>29</sup> and had specified those conditions which would trespass on United States security. Also, he drew a distinction between offensive and defensive missiles. On this point there has been much wrangling. Some writers have mistakenly dismissed out of hand the usefulness of the terms attributing too much to the intent of the user.<sup>30</sup> To argue this way is to fail to see what the President was saying. Clearly enough he only placed one type of missile in the offensive category: ground-to-ground missiles. The pertinent question then becomes, did the Soviet Union understand? Correctly, Albert and Roberta Wohlstetter are of the opinion that the Soviets did, and they cite that portion of the Russian response of 11 September which denied the need to shift

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<sup>28</sup>Statement by President Kennedy, U.S. Department of State Bulletin, Volume XLVII, No. 1213 (September 24, 1962), 450.

<sup>29</sup>Roberta Wohlstetter, "Cuba and Pearl Harbor: Hindsight and Foresight," Foreign Affairs, Vol. 43 (July, 1965), 700.

<sup>30</sup>Windass, op. cit., p. 1, and Quincy Wright, "The Cuban Quarantine," American Journal of International Law, Vol. 57 (July, 1963), 551.

the type missile the President had categorized as offensive.<sup>31</sup> One additional observation on the same reply is worth noting. It is known today that on 11 September, Soviet ground-to-ground missiles were enroute to, or arriving at Cuban ports. Yet, here is an example of how the Soviet Union used the intent argument to their own advantage:

The armaments and military equipment sent to Cuba are designed exclusively for defensive purposes and the President of the United States and the American military just as the military of any country know what means of defense are. How can these means threaten the United States?<sup>32</sup>

On 13 September the President responded to the Moscow statement of 11 September by once again underlining what was not tolerable in the way of Soviet aid to Cuba:

But let me make this clear once again: If at any time the Communist buildup in Cuba were to endanger or interfere with our security in any way, including our base at Guantanamo, our passage to the Panama Canal, our missile and space activities at Cape Canaveral, or the lives of American citizens in this country, or if Cuba should ever attempt to export its aggressive purposes by force or the threat of force against any nation in this hemisphere, or become an offensive military base of significant capacity for the Soviet Union, then this country will do whatever must be done to protect its own security and that of its allies.<sup>33</sup>

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<sup>31</sup>Albert and Roberta Wohlstetter, "Controlling the Risks in Cuba," Adelphi Papers Number 17 (April, 1965) (London: The Institute for Strategic Studies, 1965), p. 21. The authors' exact citation is quoted as follows: ". . . there is no need for the Soviet Union to shift its weapons . . . to any other country, for instance Cuba . . . the Soviet Union has rockets so powerful to carry . . . nuclear warheads that there is no need to search for sites for them beyond the boundries of the Soviet Union . . . the Soviet Union has the capability from its own territory to render assistance to any peace-loving state and not only to Cuba." (Tass press release of 11 September 1962).

<sup>32</sup>The New York Times, September 12, 1962, p. 16.

<sup>33</sup>Statement of President Kennedy, U.S. Department of State Bulletin Vol. XLVII, No. 1214 (October 1, 1962), pp. 481-482.

Congressional Hearings

On 13 September, by unanimous consent, the Committee on Foreign Relations and the Committee on Armed Services of the Senate met in joint session to investigate whether or not the Monroe Doctrine had been violated, discarded, or strictly circumscribed by other multilateral agreements, and to consider several resolutions relating to the Monroe Doctrine situation in Cuba.<sup>34</sup> This particular hearing was not only important for its contribution to the resolution that was finally adopted, but also for the definitive testimony that was given concerning the Doctrine, and certain assertions that were made with reference to the relevant principle of self defense.

Secretary Rusk was the principal witness. First, he tried to define for the Senators what the Monroe Doctrine did not mean. Contrary to Senator Keating's interpretation, Secretary Rusk convincingly argued that the Monroe Doctrine did not give the United States the right to intervene in Cuba to restore independence and self-determination to the Cuban people. "This," he said, "would be the substance of the Platt Amendment."<sup>35</sup> Next, Secretary Rusk attempted to indicate how the Doctrine ought to be executed in a modern day context. Affirming that the Monroe Doctrine was still "a part of our approach to our national security interests,"<sup>36</sup> he added that

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<sup>34</sup>United States Congress, Senate, Committee on Foreign Relations and Committee on Armed Services, Situation in Cuba, Hearings, 87th Congress, 2nd Session, on S.J. Res. 226 and others, Sept. 17, 1962 (Washington: Government Printing Office, 1962), p. 1.

<sup>35</sup>Ibid., p. 67

<sup>36</sup>Ibid., p. 34

"the method of carrying it out had been altered,"<sup>37</sup> because we could not "really act alone in these matters without heavily involving those who are closely allied with us."<sup>38</sup> In summary then, comparing the testimony of Secretary Rusk with the substantive words<sup>39</sup> of the Monroe Doctrine, it appears that the hearings resulted in showing that the Doctrine had been amended in only one way: unilateral action without prior consultation of allies was ruled out. Since this procedure had been voluntarily entered into by the United States, the implication was that the Doctrine had not been handicapped.

During the hearings certain statements were made concerning the principle of self defense. Some of these assertions were forthright, others were less clear, reflecting this author believes, the forgotten qualification that Article 51 of the United Nations Charter places on the notion of self defense. For example, Senator Miller was of the opinion that the Charter did not qualify the right of self defense in any sense:

I recognize that the United Nations Charter is one that we are trying to live up to, but the inherent right of self-defense is recognized as being something that is not obliged by the United Nations Charter . . . .<sup>40</sup>

Similarly, Senator Hickenlooper expressed the same idea when he was

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<sup>37</sup>Ibid

<sup>38</sup>Ibid., p. 57

<sup>39</sup>President James Monroe, announcing the Monroe Doctrine in 1823, declared to the Congress that we should consider any attempt on the part of European powers "to extend their system to any portion of this hemisphere as dangerous to our peace and safety." Ibid., p. 89.

<sup>40</sup>Ibid., p. 76

questioning Secretary Rusk:

Senator Hickenlooper. Isn't there a provision in either the treaty or the collateral agreements to the effect that no country could invade or could enter the territory of another country except in self-defense? That is always reserved. It is an inherent right.

Secretary Rusk: I think except in case of armed attack there was the obligation to consult.<sup>41</sup>

The reason for introducing the foregoing at this point is to digress for a moment to illustrate how responsible officials perceive the meaning of self-defense as something inherent and self-defined. The problem is that the Charter sees it differently. This troublesome distinction will be discussed fully in the following chapters.

At the conclusion of the hearings what resulted was a strong and meaningful resolution which read in part:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That the United States is determined--

(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;

(b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

(c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.<sup>42</sup>

#### The OAS Meeting of 2-3 October

The next move by Washington was to call for an informal meeting of the foreign ministers to discuss the situation in Cuba. No new

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<sup>41</sup>Ibid., p. 50.

<sup>42</sup>S.J. Res. 230; passed by the Senate on Sept. 20th by a vote of 86 to 1 and by the House of Representatives on Sept. 26th by a vote of 384 to 7. Reproduced in The Department of State Bulletin, Vol. XLVII, No. 1217 (October 22, 1962), 597.

announcements were made but it is worth noting here for two reasons:

(1) in their final communique the ministers observed that it was "Desireable to intensify individual and collective surveillance of the delivery of arms and implements of war and all other items of strategic importance to the communist regime in Cuba . . . ;"<sup>43</sup> and (2) it seemed to express considerably more solidarity than had heretofore been achieved. This author can only speculate, but it seems that in addition to transmitting signals to Moscow, the Joint Resolution had as well been understood by Latin America.

#### Discovery of Surface-to-Surface Missiles

As the month of October opened, the intelligence community in the United States began receiving more reports of large Soviet missile activity in Cuba. Such claims, the majority of which originated in unfounded refugee reports, were common in the past. However, this time four reports in particular aroused special interest. One told of hearing a loose tongued Cuban pilot boast that Cuba had long-range missiles and need no longer fear the United States; another two reported unusual activity at the Western end of the island associated with missiles; and the fourth told of a middle-of-the-night truck-trailer convoy moving long canvas covered crates toward the West. The Administration decided to investigate the reports with the U-2,<sup>44</sup> and on 14 October a surface-to-surface missile installation was discovered.

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<sup>43</sup>Informal Meeting of Ministers of Foreign Affairs of the American Republics; The Department of State Bulletin, Vol. XLVII, No. 1217 (October 22, 1962), p. 600.

<sup>44</sup>Hilsman, op. cit., pp. 174-175.



Summary

The purpose of this first chapter was to present a narrative of the important events leading up to the crisis. There are at least two threads of thought in the events just described. One theme that comes through is the strength of multilateral arrangements. The United States went so far as to sponsor a surreptitious invasion of Cuba in order to serve its own national interests. Yet, when our involvement in the clandestine endeavor became known, the setback did not result in a rupture of the alliance. The other thread which can be identified is the critical role intelligence played in preparing for the eventuality. The early discovery of the surface-to-air missiles by the U-2 provided time for the Administration to formulate a policy, promulgate it, and obtain a solid expression of confidence from Congress—all before the existence of the surface-to-surface missiles were established. Thus, when the crisis broke the Administration was ready to handle the threat with many of the essential preliminaries already accomplished.

## CHAPTER II

### DECISION MAKING

The decision making process represents step two in the analysis of how the United States case was developed. When the crisis broke the EXCOM immediately went into session. The recommendations and decisions that were made in those sessions, opened and closed certain doors leading eventually to how the United States would justify its case. The purpose of this chapter is to describe what considerations were undertaken, and through analysis and interpretation, determine those factors which were most influential in deciding the ultimate course of action.

#### I. ESTIMATE OF THE THREAT

After the U-2 photographs were developed, the first consideration the EXCOM had to go through was an appraisal of why the Soviet Union had implanted the missiles in Cuba. Theodore C. Sorensen, President Kennedy's Special Assistant, who sat as a member of the EXCOM through all its sessions has provided for us the following answers which are quoted in part:

Theory 1. Cold War Politics. Khrushchev believed that the American people were too timid to risk nuclear war and too concerned with legalisms to justify any distinction between our overseas missile bases and his - that once we were actually confronted with the missiles we would do nothing but protest - that we would thereby appear weak and irresolute to the world, causing our allies to doubt our word and to seek accommodations with the Soviets, and permitting increased communist sway in Latin America in particular. This was a probe, a test of America's will to resist.

Theory 2. Diverting Trap. If the United States did respond, presumably by attacking "little" Cuba, the Allies would be divided, the United Nations horrified, the Latin Americans more anti-American than ever, and our forces and energies diverted while Khrushchev moved

swiftly in on Berlin.

Theory 3. Cuban Defense. A Soviet satellite in the Western Hemisphere was so valuable to Khrushchev -in both his drive for expansion and his contest with Red China - that he could not allow it to fall; and thus, in his view, an invasion from the United States or hostile Latin-American states, which seemed inevitable if Cuba collapsed internally, had to be prevented at all costs.

Theory 4. Bargaining Barter. Well aware of Cuba's sensitive role in domestic American politics, Khrushchev intended to use these bases in a Summit or United Nations confrontation with Kennedy as effective bargaining power - to trade them off for his kind of Berlin settlement, or for a withdrawal of American overseas bases.

Theory 5. Missile Power. The Soviets could no longer benefit from the fiction that the missile gap was in their favor. To close it with ICBM's (intercontinental ballistic missiles) and submarine-based missiles was too expensive. Providing Cuban bases for their existing MRBM's and IRBM's (medium and intermediate range ballistic missiles) gave them a swift and comparatively inexpensive means of adding sharply to the total number of missiles targeted on the United States, positioned to by-pass most of our missile warning systems and permitting virtually no tactical warning time between their launch and their arrival on target.<sup>45</sup>

In an analysis of the above theories Theodore Sorensen tells us that President Kennedy regarded the third and fifth theories as offering likely but insufficient motives and that the President leaned most strongly on the first theory. Whichever theory was correct, it was the President's assessment that the Soviet move, if successful, would materially and politically alter the balance of power in appearances, and in matters of national will and world leadership, such appearances contributed to reality.<sup>46</sup> As Arnold L. Horelick has written, "It is difficult to conceive of any other measure that promised to produce so large an improvement in the Soviet strategic position as quickly or as cheaply."<sup>47</sup>

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<sup>45</sup>Sorensen, op. cit., pp. 762-764.

<sup>46</sup>Ibid., p. 764.

<sup>47</sup>Arnold L. Horelick, "The Cuban Missile Crisis: An analysis of Soviet Calculations and Behavior," World Politics, Vol. XVI, (April 1964) 376..

Upon conclusion of the foregoing analysis, the EXCOM entered into a week long cautious weighing of all alternatives for the purposes of hammering out a final decision before the Soviet missile installations could become operational.

## II. ALTERNATIVES CONSIDERED

### WHICH DID NOT CALL FOR MILITARY ACTION

#### The Do Nothing Alternative

As a course of action, "do nothing" was never formally considered, but grew out of Secretary McNamara's argument that a missile is a missile. He contended that it made no difference whether the missiles were fired from the Soviet Union or Cuba, the effect was the same. Thus, the implication of McNamara's position was that the United States should do nothing.<sup>48</sup>

Recalling the President's analysis of the strategic situation, it is obvious that "do nothing" was an unacceptable alternative. Besides, the Administration was already on record stating that such installations were unacceptable. Discussion of this alternative was terminated when Paul Nitze, then Assistant Secretary of Defense for International Security Affairs, called attention to the fact that the presence of missiles in Cuba would expose a large part of the American strategic bomber force based in the southeastern part of the United States to sudden attack on the ground with warning time cut from fifteen minutes to two or three minutes.<sup>49</sup>

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<sup>48</sup>Hilsman, op. cit., p. 195

<sup>49</sup>Ibid.

### The Diplomatic Alternative

A direct diplomatic approach to Khrushchev, or Castro, or both, was seriously considered by the EXCOM. The proposal to Castro would take the form of a simple warning: either split off from the Soviets or else witness the island's downfall. This idea was set aside when the President reminded the EXCOM that the confrontation was one of Great Powers and that a solution would have to be found on that level.<sup>50</sup> Towards the Russians, Adlai Stevenson, then Ambassador to the United Nations, recommended offering an exchange: Jupiter missiles in Turkey for Soviet missiles in Cuba. President Kennedy rejected this suggestion on the grounds that such an exchange could wreck the Western alliance by seeming to confirm Charles de Gaulle's suspicion that the United States would abandon its partners when its own security was at stake.<sup>51</sup> These considerations aside, an opportunity for diplomacy occurred on 18 October when the Soviet Foreign Minister, Andrei Gromyko, made a routine call on the President.

Whether Gromyko knew of the existence of the missile installation or not is unknown, but the Administration thought he did. During the visit President Kennedy personally read to Gromyko the key sentences from his statement of 13 September to which Gromyko replied that the Soviet assistance to Cuba was solely for the purposes of contributing to the defense capabilities of Cuba, adding that if it were otherwise the Soviet Government would

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<sup>50</sup>Sorensen, op. cit., pp. 769-770

<sup>51</sup>Elie Abel, The Missile Crisis, (Philadelphia: J.B. Lippincott Company, 1965), p. 95.

never had become involved in rendering such assistance.<sup>52</sup> As might have been expected, nothing came of this meeting because Kennedy had not formulated a plan of action at this time and was not prepared to tip his hand, and likewise Gromyko had no reason to "confess" about something that he did not know had been discovered.

#### The Take it to the United Nations Alternative

None of the accounts of what went on in the EXCOM elaborate to any great extent why it was decided not to rely on the United Nations to provide a solution to the missile crisis. Surely this decision was made—even though the United States went through the motions later on with good effect—simply because the quarantine action would have been incongruous with a contrary decision. Sorensen only tells us that the President "was not willing to let the United Nations debate and Khrushchev equivocate while the missiles became operational."<sup>53</sup> Elie Abel adds that "arraigning the Soviet Union and Cuba before the United Nations Security Council held little promise for two reasons: the Russian veto and the fact that Valerian Zorin of the Soviet Union happened to be Chairman of the Council for October."<sup>54</sup> While the foregoing might seem to provide a satisfactory explanation, this author is of the opinion that a more pointed argument was equally, if not more, applicable.

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<sup>52</sup>Arthur M. Schlesinger, Jr., A Thousand Days, (Boston: Houghton Mifflin Company, 1965), p. 671.

<sup>53</sup>Sorensen, op. cit., p. 770.

<sup>54</sup>Abel, op. cit., p. 61.

Looking at the alternative aside from the general voting record of the Soviet Union,<sup>55</sup> could it have been realistically expected that the Soviet Union would have approved of a resolution calling for the "Immediate dismantling and withdrawal from Cuba of all missiles and offensive weapons?"<sup>56</sup> Obviously not. There is more involved here than just the veto complaint. Such action would clearly have been contrary to Soviet interests, and to have expected different conduct on the part of the Soviet Union would not only have been naive, but would not have recognized, as Inis Claude has written, that "the adoption of the veto provision was in itself an acknowledgment of the fact that the United Nations was neither intended nor expected to take collective action in opposition to the will of a major power."<sup>57</sup>

Theory has it that the resolution could then have been taken to the General Assembly. Assuming that the odds would have been favorable, which they were not, (the Soviet bloc could count on about 30-37 out of 105 votes),<sup>58</sup> and that passage could have been achieved, what would have

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<sup>55</sup>Soviet use of the veto is tabulated in Sidney D. Bailey, "Veto in the Security Council," International Conciliation, No. 566 (January 1968), 5.

<sup>56</sup>U.S. Draft Resolution presented to the U.N. Security Council, October 22, 1962.

<sup>57</sup>Inis L. Claude, Jr., Power and International Relations (New York: Random House, 1962), p. 162.

<sup>58</sup>This estimate is borrowed from Henry M. Pachter, Collision Course (New York: Praeger, 1963), p. 40. "There are 12 Communist votes, plus Mali, Ghana, Guinea, and at least 5 of the 13 Arab states that often vote with the Soviet bloc--a total of 20 votes. The neutralist reservoir includes 8 states in Southeast Asia, probably 6 in Black Africa, the rest of the Arabs, and--except in hemisphere matters--Mexico, Brazil, Chile, and Bolivia."

been the result? If the United Nations had attempted to compel the Soviet Union to submit to its will, the action would have degenerated into a major war.<sup>59</sup> Also, there is the other side of the coin. Would not United States action had been much more difficult if it had been defeated in the General Assembly?

The foregoing discussion has attempted to place the generalization that one often hears about the veto in its proper perspective in order to provide a more complete rationale why the United States should not have relied upon the United Nations to provide a solution to the crisis. While it may be said of the Security Council that "the veto has largely disabled it from fulfilling its intended role in keeping peace,"<sup>60</sup> the argument is not so persuasive in situations of this type.

Thus, with the do nothing, diplomatic, and United Nations alternatives eliminated, it was perceived by the EXCOM that some threat or use of force by the United States would be required to persuade the Russians to do something they would not do otherwise.

### III. ALTERNATIVES CONSIDERED WHICH INVOLVED THE USE OF FORCE

#### The Invasion Alternative

Invasion was the first method considered for removing the threat

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<sup>59</sup>Raymond Aron "What is a Theory of International Relations" Journal of International Affairs, Vol. 21(2), 1967, p. 191. The author has paraphrased Mr. Aron's words as was given in a hypothetical situation to apply to this particular case.

<sup>60</sup>Abram Gayes, "Law and the Quarantine of Cuba" Foreign Affairs, Vol. 41, No. 3 (April 1963), 550-557.



by use of force. The plan had one advantage that none of the other alternatives offered: an opportunity to get rid of Castro. But although this incentive was attractive, other reasons prevailed heavily against it. There was the problem of concealment. To muster the invasion force, the secret could not be kept up to the moment of attack. Then, casualties would be high. Russians would undoubtedly be killed in the fighting, and this would further aggravate an already tense situation. And, finally, world opinion would raise a great cry of protest.

### The Air Strike Alternative

Many members of the EXCOM believed that the best solution to the problem was a surprise air attack. The action would be directed precisely at the source of the threat and the results would be positive, quick, and decisive. While all this was true the opponents of the plan admitted, air attack had one serious deficiency, and ran the risk of two others: First, 100 percent success could not be guaranteed; this being the case, invasion would be required to complete the task. Second, the Russians manning the missile sites represented an independent variable. Would they, under attack, launch their missiles believing that World War III had begun? It could not be known that they would not. And lastly, what of Khrushchev's reactions. Would the cost in Russian lives impel him to retaliate, further widening and escalating the conflict? Very possibly it would.<sup>61</sup> In the discussions that followed the foregoing considerations, Robert F. Kennedy took the position that a surprise attack was immoral. He argued that the attack would not only do irreparable damage to the image of the United States in the eyes of the world, but would wound the nation's

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<sup>61</sup>Hilsman, op. cit., p. 204.

conscience as well, adding that he did not want to see his brother go down in history as the American Tojo.<sup>62</sup> Dean Acheson sharply disagreed. Elie Abel recounts Acheson's reaction as follows:

He rejected the Pearl Harbor analogy with majestic scorn. For more than a century the Monroe Doctrine had made clear to all the world that the United States would not tolerate the intrusion of any European power into the Americas, Acheson said. Now that it had happened, the intrusion could only be regarded as a definitely unfriendly act. Both the President and the Congress had warned in unmistakable terms that the United States would be forced to act if the Soviet Union installed offensive weapons in Cuba. He cited the Presidential warnings of September 4 and 13 and the Congressional resolution of October 3 authorizing the President to prevent "by whatever means may be necessary, including the use of arms," the creation in Cuba of a foreign military base endangering the security of the United States, surely that was warning enough, Acheson said.<sup>63</sup>

Following this verbal exchange, Elie Abel tells us that a bitter argument ensued between the Attorney General and the Former Secretary of State about the relevancy of moral considerations. While this may be an accurate description of the scene, it also seems worth adding that the debate might not have been one wholly devoted to morality as has been portrayed. Just as likely, both men, by implication, could have had different opinions about the opportunity cost of bombing. Kennedy arguing for the foregone opportunity of support from abroad and avoiding the risks of a Soviet reaction, while Acheson argued for the foregone opportunity of removing the missiles quickly.

### The Blockade Alternative

The blockade plan was conceived to prevent the further importation of missiles into Cuba. That it did not provide an immediate answer to the missiles already in place was a serious drawback that troubled the minds of the plans proponents; as Sorensen asked himself: "How would it help

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<sup>62</sup>Hilsman, op. cit., p. 203.

<sup>64</sup>Ibid., p. 80-81.

<sup>63</sup>Abel, op. cit., p. 64-65.

to get them out?"<sup>65</sup> But that difficulty was to be resolved later on. Of itself, blockade was not free of disadvantages. It was recognized by the EXCOM to be an infringement on the principle of freedom of the seas, a tradition the United States had long upheld. Also, it might alienate many maritime nations who were friendly to the United States. And there was the larger problem that it was commonly regarded as an act of war, and war was not what the Administration wanted if it could be avoided.

On the plus side of the ledger, provided one necessary condition could be fulfilled, blockade had many distinct advantages: First, the blockade could be executed in steps of graduated severity. As time progressed, more pressure could be brought to bear by increasing the list of contraband. Then, it involved no irrevocable action such as invasion or air strike. There would be no violation of Cuban territory, no loss of lives, and the risk of provoking the Soviets into a spasmodic reaction would be minimized. However, the necessary condition for the foregoing was Soviet acquiescence, which the Kremlinologists estimated to be high but not certain.<sup>66</sup>

At this point let us pause for a moment to consider the situation. The accounts of the EXCOM sessions tell us that the President's advisers are strongly drawn to the blockade alternative facing three thorny problems: (1) blockade makes no provision for removing the missiles in place, (2) the most promising course of action is also considered an

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<sup>65</sup>Sorensen, op. cit., p. 781.

<sup>66</sup>Ibid., p. 777.

act of war, and (3) realization of the benefits of blockade rests on Soviet acquiescence; if the Soviet ships choose to ignore the blockade, United States Forces will have to fire first provoking a Soviet counter-attack at sea or retaliatory move elsewhere.<sup>67</sup> Problem (1) will be solved by the EXOM and need not concern us for the moment. Problems (2) and (3) remain. Sorensen describes the impasse:

We could not even be certain that the blockade route was open to us. Without obtaining a two-thirds vote in the OAS—which appeared dubious at best—allies and neutrals as well as adversaries might well regard it as an illegal blockade, in violation of the United Nations Charter and international law. If so, they might feel free to defy it.<sup>68</sup>

Sorensen is obviously talking about legitimizing the blockade for the purpose of acceptance and acquiescence, but he is doubtful of success without OAS authorization. Nevertheless, does the EXCOM really believe that the Soviets will be influenced by legalities? Let us return to the session and find out.

Next came the turn of the lawyers to consider the legality of each alternative. Elie Abel states that Dean Acheson took the position that "legal niceties were so much pompous foolishness in a situation where the essential security of the United States, its prestige, its pledged word to defend the Americas was threatened."<sup>69</sup> But George Ball argued that a naval blockade though traditionally regarded as an act of war, would have at least more of a "color of legality."<sup>70</sup> Following George Ball, Leonard Meeker, the Deputy Legal Adviser for the State

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<sup>67</sup>Ibid., p. 775.

<sup>68</sup>Ibid.,

<sup>69</sup>Abel, op. cit., p. 72.

<sup>70</sup>Ibid., pp. 72-73.

Department, suggested for the first time that a name change might be in order. Borrowing the phrase from Franklin D. Roosevelt's "quarantine the aggressor" speech<sup>71</sup> he proposed that the blockade might be better called a "defensive quarantine."<sup>72</sup> The following day, more legal considerations were added. Llewellyn Thompson made the point that the Russians were impressed by legalities, and if the OAS should pass a resolution endorsing the blockade, "Moscow might be inclined to take it seriously."<sup>73</sup>

Reviewing the foregoing comments, it is apparent that the opinions did express an affirmative answer to the question previously posed. It does seem that the EXCOM did believe that the law would, to some degree, influence the decision makers in the Kremlin, and thereby provide a measure of protection against the contingency discussed in Problem (3). The accounts of the sessions do not reflect a dissenting opinion, and even Dean Acheson's remarks were not contrary to the majority view, but merely an expression of the uselessness of it all.

Returning for a moment to Leonard Meeker's recommendation on the name change, it should be emphasized that this suggestion was much more than just an exercise in semantics or a lawyer's trick to obfuscate the true nature of the operation. That the term "quarantine" has elicited such cynical remarks is indeed regrettable, since the term made it possible for the United States to immediately communicate a non-belligerent intent to the Soviet Union, and made possible a solution to the dichotomous situation described in Problem (2).

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<sup>71</sup>The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 6 p. 406, 410.

<sup>72</sup>Abel, op. cit., p. 73

<sup>73</sup>Ibid., p. 87.

On going to the OAS, it should be pointed out at this stage that nothing has been presented as to which authorizing article will be sought. All we know is that there is a desire to legitimize via the OAS. With this reminder it should also be emphasized, as Elie Able has written, that "legalities had less to do with the choice than the practical argument that a naval blockade would avoid killing Russians and give the Kremlin some time to reflect."<sup>74</sup>

The ultimate deciding factor between air strike and blockade was McNamara's suggestion that the blockade preserved the initiative and retained the option of making more choices. Arguing that the matter was not a question of this or that, he rationalized that the action could begin with blockade, and if that did not work then the United States could go to air strike, and finally invasion. This then was the solution to the question of how the blockade would address itself to the missiles already in place (Problem (1)). Each stage provided a pause in between and gave both the President and Khrushchev time to think. President Kennedy was to agree; it preserved his options and left some for Khrushchev too.<sup>75</sup>

#### IV. TACTICAL DECISIONS

##### ON THE EVE OF ANNOUNCEMENT

##### Meeting with the National Security Council (NSC)

On Sunday, 21 October, the President met with the NSC. No new

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<sup>74</sup>Ibid., p. 73.

<sup>75</sup>Ibid., p. 94.

developments were presented at this meeting, but for the scholarly purpose of this inquiry, it should be established that the United States clearly intended to use force. Many partisan analyzes of this case have made too much of the fact that force was never used. A classic example is given by Captain McDevitt's summarization that the "entire operation amounted to no more than a partial interruption of sea communications with Cuba."<sup>76</sup> Such a conclusion denies the reality that "a legal norm, like a rubber band, cannot be stretched ad infinitum without being broken."<sup>77</sup>

The evidence of the intended use<sup>of</sup> force is contained in the conversation that took place at this meeting of the NSC when the President asked the Chief of Naval Operations, Admiral George W. Anderson, Jr., USN, to describe the plans and procedures for the blockade. These are Sorensen's recollections of the event:

Admiral Anderson: Each approaching ship would be signaled to stop for boarding and inspection. Then, if no satisfactory response was forthcoming, a shot would be fired across her bow. Finally, if there was still no satisfactory response, a shot would be fired into her rudder to cripple but not to sink.

President Kennedy: You're certain that can be done?

Admiral Anderson: Yes sir.<sup>78</sup>

#### The Draft of President Kennedy's Speech of 22 October

The changes that went into the draft of the President's speech were significant and far reaching. Theodore Sorensen had written the speech the night before and it was presented to the EXCOM the following

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<sup>76</sup>CAPT Joseph B. McDevitt, USN, "The UN Charter and the Cuban Quarantine", The JAG Journal, Vol. XVII, No. 3 (April-May 1963), 75.

<sup>77</sup>Oliver J. Lissitzyn, "International Law in a Divided World," International Conciliation, No. 542 (March, 1963), 25.

<sup>78</sup>Sorensen, op. cit., p. 787.

day. The most significant change that was made had to do with Article 51, which, because of its importance, deserves special attention.

#### Article 51 Considerations

There have been numerous debates among scholars of international law on the applicability of Article 51 to this case.<sup>79</sup> Specifically, the arguments have dealt primarily with the provocation criteria established by the term "if armed attack occurs." The controversy has resulted in the formation of two schools of thought on the subject: those who interpret the term broadly, and those who define it narrowly.<sup>80</sup> Briefly, the broad constructionists argue that the term has to mean more than its plain literal interpretation because of reasons of custom and the state-of-the-art of modern day weaponry. The proponents of the customary reason maintain that in addition to Article 51 there is also a customary or traditional right of self-defense quite apart from the Charter which permits self-defense in the face of a threat, as well as, an armed attack.<sup>81</sup> Those who support the state-of-the-art argument contend that armed attack must include the imminent threat of armed attack—and that the right of self-defense is therefore anticipatory—because it would be absurd to require a state to refrain from taking measures for its own self-defense

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<sup>79</sup>See Proceedings of the American Society of International Law, 1963, pp. 1-18, 145-153, 162-173; and Proceedings of the American Society of International Law, 1964, pp. 1-9, 18-19.

<sup>80</sup>The broad constructionists have the clear majority.

<sup>81</sup>Brunson MacChesney, "Some comments on the 'Quarantine' of Cuba" American Journal of International Law, Vol. 57 (July, 1963), pp. 592-597; Professor MacChesney's article is particularly valuable for his discussion of the customary right.



until the arrival of a devastating nuclear attack; this "would make self-defense meaningless; there would be nothing left to defend."<sup>82</sup> On the other hand, the narrow constructionists argue that armed attack has to be defined narrowly because to do otherwise is to invite excessive claims of self-defense. They argue that the Charter did intend to limit the traditional right of self-defense;<sup>83</sup> that the concept of anticipatory self-defense is destabilizing because such an extension would replace a standard which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication, with one which is "ambiguous, deceptive, and dangerously flexible."<sup>84</sup> With these arguments in mind, let us return to the EXCOM.

Up to this point the EXCOM is interested in legitimizing the quarantine for the purposes of acceptance and acquiescence. The recommendation has been made to seek authority from the OAS which the President will soon approve. Now, in Marches Theodore Sorensen with his draft of the speech. Sorensen tells us that when the President is asked "how we would explain our action to other nations long living in the shadow of missiles;"<sup>85</sup> his reaction is to delete "specific reference to armed attack under Article 51 of the United Nations Charter"<sup>86</sup> and substitute

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<sup>82</sup>C.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal?" American Journal of International Law, Vol. 57 (July, 1963), 589.

<sup>83</sup>Wright, op. cit., p. 560.

<sup>84</sup>Louis Henkin, "International Law and National Behavior," Recueil Des Cours (Hague Academy of International Law), 1965-1 (Printed in the Netherlands: A.W. Sijthoff, 1965), p. 266.

<sup>85</sup>Sorensen, op. cit., p. 789.

<sup>86</sup>Ibid.

the following words (which appeared in the released text):

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive, and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.<sup>87</sup>

Who prompted the change? Although Ted Sorensen does not say, Elie Abel suggests that it was Abram Chayes, the State Department's Legal Advisor. According to Abel, Chayes argued for the deletion of Article 51 on the grounds that it would provide the Russians with a precedent that they might use in the future. Instead of Article 51, Chayes recommended that the legal basis of the blockade should be the right of the OAS to take collective security measures.<sup>88</sup> Unfortunately, Elie Abel does not elaborate on what Chayes might have meant by the term "collective security measures"; therefore, we must speculate a bit further.

Recalling that the EXCOM is interested in promoting acquiescence, the importance of Chayes' suggestion lies in the contribution it made to that goal. By stating that the blockade's legal basis should be the right of the OAS to take collective security measures, he is betting that the probability of a violent reaction will be greatly reduced if the operation is wrapped in a cloth of broader authority. Analogous to the situation in everyday life, an ordinary citizen under threat of attack has a perfectly legal right to invoke self defense. However, if that same person is interested in warding off his attacker, then his security is improved if he can have himself deputized.

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<sup>87</sup>Ibid.

<sup>88</sup>Abel, op. cit., p. 105. Technically, Article 51 and "collective security measures" are not mutually exclusive. Art. 3 of the Rio Treaty explicitly provides for collective security measures and makes direct reference to Art. 51. In this case though, it is believed that Chayes did not use the term with Art. 3 in mind.

No one will argue that "armed attack" (in the literal sense) had occurred. But to say that the United States was not acting according to principles of self-defense is to deny the President's words. A close reading of the President's rephrasing of Article 51 suggests that in this particular situation "if armed attack occurs" meant to him "if any sudden change in the deployment of ballistic missiles occurs." From a legal point of view, it can hardly be argued that there is any rule of international law that requires nations to give publicity to their defensive arrangements. But on the other hand, "if two men are trying to maintain a see-saw in precarious equilibrium, then the force of the argument against sudden and unannounced moves becomes immediately apparent."<sup>89</sup> Therefore, this author is of the opinion that the United States and/or the OAS could have, if they had wished, used Article 51 to authorize the quarantine as an individual or collective self-defense measure under the so called rule of uberrima fides, where a treaty admits of two constructions, the one giving the most favorable right is to be preferred.<sup>90</sup> But why—and here is where a lawyer's appreciation of the finer aspects of the law came into play—establish a precedent which may some day be used against you if a more convenient provision is already available (albeit that its use will involve some stretching of Article 53(1)), namely Article 6 and 8 of the Rio Treaty which provides for the use of armed force "if the

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<sup>89</sup>Windass, op. cit., p. 12.

<sup>90</sup>Territory of Hawaii v. Ho, 41 Hawaii Reports 565 (S. Ct. Hawaii 1957) in Abram Chayes, et. al. The International Legal Process, Vol I., unpublished, p. 112.

inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . ." <sup>91</sup> (emphasis supplied)

The above, then, are believed to be the reasons for the first change to the draft of President Kennedy's speech.

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<sup>91</sup>The Rio Treaty provides for collective action, not only in the case of armed attack, which is covered by Article 3, but also:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . or by any other fact or situation that might endanger the peace of America . . .

(Article 6)

In such cases, the Organ of Consultation, consisting of the Foreign Ministers of the Member States, or representatives specifically designated for the purpose, is to

meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent. (Article 6)

The Organ of Consultation acts "by a vote of two-thirds of the Signatory States which have ratified the Treaty." (Article 17)

The treaty is explicit as to the measures which may be taken by the Organ of Consultation in any situation covered by Article 6. These measures are listed in Article 8 and specifically include "use of armed force."

Article 20 further specifies that decisions to take any of the measures listed in Article 8 shall be binding, except that "no State shall be required to use armed force without its consent."

The foregoing explanation is borrowed in format from Meeker, op. cit., p. 516

Going to the OAS

In his book The Missile Crisis, Elie Abel tells us that "Edwin Martin, the able, methodical Assistant Secretary of State for inter-American affairs, estimated there was one chance in four that the Organization of American States would approve the quarantine action by the necessary two-thirds majority."<sup>92</sup> Whether Edwin Martin had perceived the odds correctly was not so important as recognizing the necessity of accepting the element of risk. This the President did, realizing that rejection of the United States' request would not only be embarrassing, but would provide the Soviet Union with a propaganda tool as well, and make the case less "saleable" to world public opinion.

When the President was asked if he would initiate the quarantine without OAS approval, his answer was: yes, because United States national security was directly involved; but hoping to obtain OAS endorsement, Sorensen observed that "he deliberately obscured this question in his speech by a call for unspecified OAS action and an announcement of the blockade and other steps 'in defense of our own security'."<sup>93</sup> Later, when Abram Chayes was asked if the United States had only considered the OAS as a "rubber stamp" for its policy, he replied that

the attitude of the United States towards what is now the Organization of American States has been one mainly of getting what in government one would call 'clearance' for action by us. We have not asked the Organization of American States, we have not asked our sister republics

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<sup>92</sup>Abel, op. cit., p. 104.

<sup>93</sup>Sorensen, op. cit., p. 787.

in World War II, or later, to take action along with us. We have really asked them to permit us to act without objection by them.<sup>94</sup>

The foregoing statement seems to be contrary to the evidence in this case.

Final Changes. Two additional changes were made to Sorensen's draft. In a pair of major decisions, the word quarantine was substituted for blockade,<sup>95</sup> and at Adali Stevenson's suggestion, the phrase "render the missiles inoperable" was changed to read "dismantle and remove."<sup>96</sup>

### Summary

The foregoing chapter has inquired into the decision making process for the purpose of describing and applying analysis to the reasons behind the justification. It is believed that the following has been established: The United States chose not to rely on the United Nations to provide a solution; the quarantine was selected as a nonbelligerent first application of least force; the desire to legitimize with OAS authority was in order to improve the probability of acquiescence by endowing the quarantine force with an aura of legality; and the desire not to cite Article 51 was in order to avoid establishing a precedent.

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<sup>94</sup>Statement of Abram Chayes in The Inter-American Security System And The Cuban Crisis, Lyman M. Tondel, Jr., Editor (Dobbs Ferry, N.Y., Oceana Publications, Inc., 1964) p. 39.

<sup>95</sup>Abel, op. cit., p. 115.

<sup>96</sup>Ibid., p. 105.

## CHAPTER III

### CUBA QUARANTINED

The purpose of this chapter is to describe the events during the quarantine phase of the crisis. This description is relevant to the analysis of the way the United States justified its case because it contains the data for comparing the perceptions of the EXCOM with what actually occurred. If the objective was achieved differently from the way planned, we are interested in knowing why. Also, the information which follows contains the operational evidence for making a judgment on legal validity of the quarantine.

#### I. ULTIMATUM, APPROVAL AND DEBATE

##### President Kennedy's Address

On 22 October, after notifying allies and bringing the armed forces up to a full state of readiness, President Kennedy addressed the people of the United States in an atmosphere of crisis. He announced that the United States had unmistakable evidence that the Soviet Union was in the process of installing a series of medium range ballistic missiles (MRBM) and intermediate range ballistic missile (IRBM) sites in Cuba. That "the purpose of these bases could be none other than to provide a nuclear strike capability against the Western Hemisphere" which constituted "an explicit threat to all the Americas in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this Nation and hemisphere, the joint resolution of the 87th Congress,

the Charter of the United Nations," and his own public warnings to the Soviets of September 4 and 13. That this action was contrary to the repeated assurances of Soviet spokesmen "that the arms buildup in Cuba would retain its original defensive character." That the "secret, swift, and extraordinary buildup of Communist missiles" was "deliberately provocative and unjustified change in the status quo" which could not be accepted by this country. Acting "in defense of our own security and of the entire Western Hemisphere," he stated that a strict quarantine on all offensive military equipment was being initiated, and that "all ships of any kind bound for Cuba from whatever nation or port "would if they were found to contain cargoes of offensive weapons" be turned back." That should the offensive military preparations continue, "further action would be justified." That the United States was calling for an immediate meeting of the OAS to consider "this threat to hemispheric security and to invoke articles 6 and 8 of the Rio Treaty in support of all necessary action." That under the Charter of the United Nations, the United States was asking for an "emergency meeting of the Security Council be convoked without delay to take action against this latest Soviet threat to world peace." And, that the nation was prepared to present its case in any forum "without limiting our own freedom of action." 97

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<sup>97</sup>For the text of Pres. Kennedy's address see The Dept. Of State Bull., Vol. XLVII (Nov 12, 1962), 715. Also, some writers have seen an inconsistency in the President's statement. Professor Mallison in comparing Abram Chayes later statement that "the President in his speech did not invoke article 51 or the right of self defense" sees an apparent inconsistency between Mr. Chayes statement and the words of the President by noting that since express approval at this time had not been given by the OAS, the President's intentions must have been to impose the quarantine pursuant to self defense alone. Professor Mallison's assertion in absence of an explanation is warranted. That was one of the reasons for analysing Article 51 in Ch. II. It is believed that now the inconsistency is at least understandable. Ref: W. T. Mallison "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid under International Law," The George Washington Law Review, Vol. 31 (Oct 1962), 353 at footnote 90; and Abram Chayes, "The Legal Case for U.S. Action in Cuba," The Dept. of State Bull., Vol. XLVII (Nov. 19, 1962), 764.



The Results of the Meeting of the Organization of American States

On Tuesday morning, October 23, Secretary Rusk was in the United States' chair at the OAS hoping by his personal participation to better Edwin Martin's estimate that with luck the quarantine would get 14 approving votes, the bare minimum required.<sup>98</sup> Two draft resolutions were submitted. The first was a procedural resolution by which the Council would decide to convoke the Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and would also decide to act provisionally as that Organ in accordance with Article 12<sup>99</sup> of that treaty. Under the second resolution, the Organ of Consultation would call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons of offensive capability and would recommend, though not seek to compel, the member states of the OAS to take the measures necessary to insure that the buildup did not continue to receive additional offensive weapons, and to prevent the offensive capacity already acquired by the Castro regime from being used to destroy the peace and the security of the hemisphere.<sup>100</sup>

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<sup>98</sup>Abel, op. cit., p. 128.

<sup>99</sup>Article 12 states that: "The Governing Board of the Pan American Union may act provisionally as an organ of consultation until the meeting of the Organ of Consultation referred to in the preceeding Article takes place." The "preceeding Article referred to" is Article 11 which provides that "the consultations to which this Treaty refers shall be carried out by means of the Meetings of Ministers of Foreign Affairs of the American Republics which have ratified the Treaty, or in the manner or by the organ which in the future may be agreed upon."

<sup>100</sup>Extract from statement made by Secretary Rusk at a special meeting of the Council of the Organization of American States on October 23, 1962. For text see The Department of State Bulletin, Vol. XLVII, (Nov 12, 1962), pp. 720-722.

The first resolution was quickly adopted, and as the second was considered, the delegates of countries that had long opposed any action against Cuba took the floor one by one to announce their support for the resolution; however, there were some reservations. In the section-by-section vote that followed, Brazil, Mexico, and Boliva, abstained on the second part of paragraph two relating to the use of armed force "to prevent the missiles with offensive capability existing in Cuba from being converted at any time into an active threat to the peace and security of the continent." These countries felt that this wording might be committing them to support an invasion of Cuba without a prior specification of the respective measures.<sup>101</sup> Nevertheless, by a vote of 19 to 0 with 1 abstention, the resolution was adopted. (Uruguay abstained on October 23 because its delegate had not received instructions from his government; on October 24 Uruguay cast an affirmative vote making approval of the resolution unanimous).<sup>102</sup>

The operative clause of the resolution read as follows:

The Council of the Organization of American States Meeting as the Provisional Organ of Consultation, resolves:

1. To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability;
2. To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability

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<sup>101</sup>Inter-American Treaty of Reciprocal Assistance, Applications, Vol. II, (1960-1964)(hereinafter called Applications), p. 109.

<sup>102</sup>The Department of State Bulletin, Vol. XLVII (Nov. 12, 1962), 722.

from ever becoming an active threat to the peace and security of the Continent;

3. To inform the Security Council of the United Nations of this resolution in accordance with Article 54 of the Charter of the United Nations and to express the hope that the Security Council will, in accordance with the draft resolution introduced by the United States, dispatch United Nations observers to Cuba at the earliest moment.

4. To continue to serve provisionally as Organ of Consultation and to request the Member States to keep the Organ of Consultation duly informed of measures taken by them in accordance with paragraph two of this resolution.<sup>103</sup>

By October 29, Argentina, Columbia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, and Panama had all sent notes offering the cooperation of air and naval forces, port facilities, and other installations needed to carry out the collective action contemplated.<sup>104</sup> Thus, in the greatest display of Western Hemisphere solidarity since the days of World War II, and after several years of United States attempts at persuasion had failed, the threat of nuclear weapons in Cuba had quickly produced unity.

Ted Szulc, covering the conference for The New York Times, reported that "the Administration feels that the display of this hemisphere solidarity will not merely strengthen the United States position in the United Nations, it may also impose caution on the Russians because they may not wish to incur the open hostility of a region that they have been actively courting for years."<sup>105</sup> Whether this prediction was correct, would soon be seen; but there is no doubt that the action of the OAS, together with the show of support from the NATO allies, left the Russians with no hope of splitting the Western camp.

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<sup>103</sup>Ibid., p. 723.

<sup>104</sup>Applications, op. cit., p. 148.

<sup>105</sup>The New York Times, October 24, 1962

### Debate at the United Nations

During the evening of October 22, Ambassador Stevenson, submitted the United States request for convening of the Security Council<sup>106</sup> to which was attached a draft resolution.<sup>107</sup> The letter was important for two reasons: First, it made clear that the United States was in its declaration of intent to impose the quarantine giving effect to prior OAS determinations:

In order to give effect to the determination of the countries of the Western hemisphere which they have recently reaffirmed to safeguard and defend the peace and security of the regime against external interference and aggression, the United States is initiating a strict quarantine of Cuba . . . ."<sup>108</sup>

Second, the letter also referred to the need for "immediate" Security Council action, and proposed "the prompt and effective discharge" of the Council's responsibility. Two pertinent issues came to mind here; one that has been raised by Quincy Wright; and another which this paper has raised. Both require a reply.

Quincy Wright has found fault with the United States case between October 22-23, by asserting that the President's declaration to implement the quarantine was: (1) unilateral because OAS approval had not been given at that time; and (2) inhibiting on the OAS's judgment in

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<sup>106</sup>UN Security Council Doc. S/5181, The Department of State Bulletin, Vol. XLVII (Nov 12, 1962), 724.

<sup>107</sup>UN Security Council Doc. S/5182, The Department of State Bulletin, Vol. XLVII (Nov 12, 1962), 724.

<sup>108</sup>A reaffirmation such as that alluded to in the quoted excerpt was contained in the final communique issued at the conclusion of an informal meeting of Ministers of Foreign Affairs of the American Republics, at Washington, D.C., Oct. 2-3, 1962, op. cit., pp. 598-600.

considering the proposed resolution by presenting it with a verbal fiat accompli.<sup>109</sup> As the above letter by Ambassador Stevenson makes clear, the United States was already acting in accordance with previous agreements. On the subject of inhibiting the OAS, it is believed that sufficient evidence has already been presented to establish that proud, independent minded Latin Americans are hardly susceptible to this kind of psychological constraint.

The second issue concerns the question whether Ambassador Stevenson's remarks constitute a contradiction of what was said in Chapter II concerning reliance on the United Nations? Put another way, if this paper is correct, were his remarks mere cant? The answer to both questions is no, because his actions represented a precedural step to realize the other benefits available in the United Nations. Meaning, as Richard N. Gardner has stated: "The Cuban crisis was a particularly eloquent illustration of the United Nations threefold value to the United States as a place for debate, negotiation and action . . . ."<sup>110</sup> All this, in spite of no solution.

On October 23, the Security Council met to consider the crisis. Two draft resolutions, one American and the other Russian were laid before the Council. The American resolution asked for the immediate withdrawal of the offensive weapons, under international inspection

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<sup>109</sup>Wright, op. cit., pp. 557-558.

<sup>110</sup>Richard N. Gardner, "The United Nations in Crisis: Cuba and the Congo," The Department of State Bulletin, Vol. XLVII (April 8, 1963), 477.

to be followed by lifting of the blockade, and for negotiations between the United States and the Soviet Union. The Russian counter proposal condemned the blockade, asked for its immediate termination, and specified negotiations between the United States, the U.S.S.R., and Cuba for restoration of normalcy.<sup>111</sup>

In the debate that followed, both sides filed complaints that the other had violated Article 2(4) of the United Nations Charter. Ambassador Stevenson explicitly placed the charge directly under the article when he stated that "the installation of nuclear weapons by stealth, weapons of mass destruction in Cuba poses a dangerous threat to peace, a threat which contravenes article 2, paragraph 4 . . . ."<sup>112</sup> The allegations made against the United States by the Soviet delegate, Valerian A. Zorin, were not as explicitly set out as in the case of the United States. In their initial call for a convening of the Security Council they asked for an examination of the question of "violation of the Charter of the United Nations and threat to peace on the part of United States of America."<sup>113</sup> Again, in their opening remarks in the Security Council they declared that "the institution by the United States of a virtual blockade of Cuban shores is a provocative act, an unprecedented violation of international law . . . ."<sup>114</sup> And in their draft

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<sup>111</sup>U.N. Security Council Doc. S/5187, October 23, 1962, p. 1 (Union of Soviet Socialist Republics draft resolution).

<sup>112</sup>The Department of State Bulletin, Vol. XLVII (Nov. 12, 1960), p. 737 (Ambassador Stevenson's first statement of Oct. 25, 1963).

<sup>113</sup>U.N. Security Council Doc. S/5186, Oct. 23, 1962, p. 1 (Letter addressed to the President of the Security Council).

<sup>114</sup>U.N. Security Council Document S/5186, Oct. 23, 1962, pp. 2-7 (Statement by the Soviet Government on Cuba).

resolution of 23 October they called for the Security Council to "condemn the actions of the Government of the United States of America aimed at violating the United Nations Charter and at increasing the threat of war."<sup>115</sup> In essence, the Russians complaint amounted to a charge that the blockade constituted a threat of the use of force against their political independence to navigate on the high seas. And, to back up their charge, they chose an old familiar theme--enforcement action. Ambassador Zorin, addressing the Security Council on 23 October phrased the nature of the additional charge as follows:

In stating its intention to draw into the implementation of its aggressive actions against Cuba the Organization of American States--to which it is already dictating the effecting of collective sanctions against Cuba--the United States is openly violating the prerogatives of the Security Council which alone can offer powers for the carrying out of any enforcement measures.<sup>116</sup>

The Legal Adviser's Office of the Department of State had on 22 October correctly anticipated that the issue would be raised and were prepared to refute the charge.<sup>117</sup>

The Soviet tactic in prosecuting their argument was relatively simple. They would discredit the manner in which the United States had reacted to the alleged threat, hoping thereby to cut the ground out from under the justification given by Ambassador Stevenson. If the

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<sup>115</sup>Union of Soviet Socialist Republics draft resolution, loc. cit.

<sup>116</sup>U.N. Security Council Document S/PV, 1022, October 23, 1962, p. (Statement by Soviet Ambassador Valerian A. Zorin to the United Nations Security Council).

<sup>117</sup>Excerpts from a memorandum prepared in the Legal Adviser's Office of the Department of State on Oct. 22, 1962, entitled "Legal Basis for the Quarantine in Cuba" and distributed informally. Quoted in Abram Chayes, et. al., The International Legal Process, Vol. III, (Unpublished, 1967) pp. 58-59.

maneuver proved successful, the United States would be left defenseless, and would be branded the aggressor. Ambassador Zorin relied heavily on the official statements which his government had previously issued giving assurances that the arms shipments to Cuba were solely for "defensive" purposes. He intimated that the United States had acted like a diplomatic "outlaw" for failing to present its evidence to Mr. A. A. Gromyko when he met with the President on 18 October, and he drew on the statements of Walter Lippmann to illustrate his point.<sup>118</sup> The trust of the argument was that there was no such evidence. The outcome of this maneuver is well known. In a dramatic scene, Ambassador Stevenson ended all controversy as to whether the missiles were really there; and, also, ended all debate.<sup>119</sup> Subsequently, on 25 October, by common consent, the Security Council adjourned to permit diplomacy to work out a solution. No vote was ever taken on any resolution, but the United Nations had served its purpose in this case. Ambassador Stevenson's classic presentation had marshalled world opinion in favor of the United States as no other forum had ever done before.

## II. IMPLEMENTATION AND SUCCESS

### The Interdiction Proclamation

On the evening of October 23, after the action of the OAS, President Kennedy proclaimed the quarantine to take effect the

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<sup>118</sup>Walter Lippmann had been critical of the President's action at this meeting. He stated that the President in failing to present the evidence had suspended diplomacy.

<sup>119</sup>U.N. Security Council Official Records, 17th Year, 1025th meeting, 1-17 (S/5171).



following day. It read in part:

For the purposes of this proclamation, the following are declared to be prohibited materiel:

Surface-to-surface missiles; bomber aircraft; bombs; air-to-surface rockets and guided missiles; warheads for any of the above weapons; mechanical or electronic equipment to support or operate the above items and any other classes of materiel hereinafter designated by the Secretary of Defense for the purpose of effectuating this Proclamation.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation, within a reasonable distance of Cuba, of prohibited or restricted zones and of prescribed routes.

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is enroute to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such instructions.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self defense.<sup>120</sup> In any case, force shall be used only to the extent necessary.

#### Composition of the Quarantine Force

By agreement among the participating governments of the OAS, a combined force was established as the "Combined Quarantine Force" under the operational command of Rear Admiral John A. Tyree Jr., USN. Under

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<sup>120</sup>Interdiction Proclamation, loc. cit.

this arrangement, officers of the participating navies acted as members of the Staff of the Combined Quarantine Force, and the respective naval units were integrated in that force.<sup>121</sup>

### Controlling the Risks

When the Interdiction Proclamation went into effect there were nineteen United States ships on station located on an arc 500 miles distant from Cape Maysi, Cuba's eastern most tip. The distance had been selected by Navy planners so that the line of ships would be beyond the range of MIG fighter aircraft based in Cuba.<sup>122</sup>

Secretary of Defense McNamara announced on 23 October, that United States patrol planes had spotted 25 Soviet merchant ships on their way to Cuba, and that their courses had remained unchanged in the last 24 hours. The Secretary also announced that he had sent orders to the Navy, issued ten minutes after President Kennedy's proclamation, which contained instructions to sink if necessary, any vessels that refused to comply with the terms of the quarantine, which the Secretary said, were that the ships must either turn away from Cuban ports, submit to search and seizure if they intended to reach Cuba, and obey orders to alter their destinations if they were carrying offensive weapons.<sup>123</sup>

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<sup>121</sup>Applications, op. cit., p. 154.

<sup>122</sup>Abel, op. cit., p. 141.

<sup>123</sup>The New York Times, October 24, 1962.

On Wednesday, 24 October the Acting Secretary General of the United Nations, U. Thant, sent identical messages to President Kennedy and Chairman Khrushchev asking for "the voluntary suspension of all arms shipments to Cuba, and also the voluntary suspension of the quarantine measures . . . for a period of two or three weeks."<sup>124</sup> The purpose of the suspension was to "give time to the parties concerned to meet and discuss with a view to finding a peaceful solution to the problem."<sup>125</sup> Khrushchev's reply was brief and affirmative.<sup>126</sup> Kennedy, however, was anything but grateful for the intervention. If U Thant's proposed negotiations were to fail, once the machinery had been disconnected, it might be impossible to start it running again.<sup>127</sup> His reply reflected that while the United States was willing to talk, the quarantine would continue.<sup>128</sup> At about noon on that same day, Secretary McNamara said the Soviet ship nearest Cuba should make contact with the quarantine force at about 7:30 P.M. But later that

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<sup>124</sup>Statement by Acting Secretary General U Thant to United States Security Council, including text of letter to President Kennedy and Chairman Khrushchev, October 24, 1962. U.N. Press Release SG/1353, October 24, 1962, pp. 1-3.

<sup>125</sup>Ibid.

<sup>126</sup>Letter from Chairman Khrushchev to Acting Secretary General U Thant, October 25, 1962. The New York Times, October 26, 1962, p. 16.

<sup>127</sup>Abel, op. cit., p. 150.

<sup>128</sup>Letter from President Kennedy to Acting Secretary General U Thant, October 25, 1962, The Department of State Bulletin, Vol. XLVII, (November 12, 1962), 740.

afternoon, came the first indication of a break. Some of the Soviet dry cargo ships heading towards Cuba, including five big-hatch ships, had apparently altered course, and the rest were stopped dead in the water waiting further instructions. The President, was determined to pace events. He had issued orders that there was to be no shooting, and that the Soviet ships were to be kept in view but none was to be boarded without his express approval.<sup>129</sup> Thus the first day of the quarantine ended with no contact at sea.

At 8 A.M., Thursday morning, October 25th, twenty-two hours after the imposition of the quarantine; a Navy ship made the first interception of a Soviet ship. The oil tanker BUCHAREST was hailed and then waved on without search because the Navy was satisfied it carried only petroleum.<sup>130</sup> Back at the United Nations the replies to U Thant's first appeal had barely been received in New York when the Acting Secretary General issued a second appeal. At 2:26 P.M., he called on both sides to avoid a direct confrontation at sea for a limited time only "in order to permit discussions of the modalities of a possible agreement which could settle the problem peacefully in line with the Charter of the United Nations."<sup>131</sup> To Khrushchev, U Thant appealed for instructions to Soviet ships already on their

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<sup>129</sup>Hilsman, op. cit., p. 215.

<sup>130</sup>The New York Times, "Cuban Crisis: A Step by Step Review," November 3, 1962, pp. 1, 6-7.

<sup>131</sup>Phrase contained in both letters.

way to Cuba to "stay away from the interception area,"<sup>132</sup> and to President Kennedy. he asked that instruction be issued to United States vessels in the Caribbean "to do everything possible to avoid direct confrontation with the Soviet ships in the next few days to avoid any untoward incident."<sup>133</sup> Both Khrushchev and Kennedy accepted the proposal.<sup>134</sup> But as we have seen, both men had already implemented similar instructions on Wednesday.

Just before 8 A.M., Friday, October 26th, the first and last boarding of quarantine was executed. The SS MARUCLA, a freighter registered under the Lebanese flag, out of the Baltic port of Riga, and under Soviet charter, was intercepted by the destroyers JOHN R. PIERCE and JOSEPH P. KENNEDY, JR.. The boarding party found no contraband, and the MARUCLA, after quietly submitting to the inspection, was permitted to proceed.<sup>135</sup> This encounter had been planned with meticulous care by the President himself. Acting on Llewellyn Thompson's advise that nothing would be gained by a gratuitous affront

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<sup>132</sup>Letter from Acting Secretary General U Thant to Chairman Khrushchev, October 25, 1962. U.N. Press Release SG/1357, October 26, 1962, pp. 1-2.

<sup>133</sup>Letter from Acting Secretary General U Thant to President Kennedy, October 25, 1962. U.N. Press Release SG/1358, October 26, 1962, pp. 1-2.

<sup>134</sup>Letter from President Kennedy to Acting Secretary General U Thant, October 25, 1962. U.N. Press Release SG/1358, October 26, 1962, pp. 2-3; Letter from Chairman Khrushchev to Acting Secretary General U Thant, October 25, 1962. U.N. Press Release SG/1357, October 26, 1962, pp. 2-3.

<sup>135</sup>The New York Times, October 27, 1962, p. 6.

to Khrushchev, the President had issued detailed instructions. He wanted Khrushchev to know that the United States Navy had exercised the right claimed in his interdiction proclamation, to stop and search all vessels bound for Cuba, regardless of national registry.<sup>136</sup> Now the crucial question became, how soon would the Soviet missiles become operational?

In a series of both public and private announcements, Washington let Moscow know it would not wait forever. At a regular noon briefing, the State Department spokesman, Lincoln White, called attention to the sentence in the President's speech that further action would be justified. Pierre Salinger called a White House conference and gave the reporters a statement that development of the ballistic missile sites in Cuba was continuing at a rapid pace. And Robert Kennedy passed the word to Soviet Ambassador Dobrynin that the President could not hold off more than two days longer.<sup>137</sup> The first signs of a reaction occurred at 1:30 P.M. Friday afternoon.

John Scali, diplomatic correspondent of the American Broadcasting Company, was sitting in his pressroom cubicle in the State Department when the telephone rang. The caller was a Russian named Alexander S. Fomin, who was listed in the diplomatic bluebook as one of the several Soviet Embassy counselors, but who American security considered to be the chief of Soviet intelligence in the United States. He urged Scali to meet him and then outlined a startling proposal.

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<sup>136</sup>Abel, op. cit., p. 172

<sup>137</sup>Ibid., pp. 173-174.

Would the State Department be interested in settling the crisis on these terms: the Soviet Union would agree to remove the missiles and the United States would pledge itself not to invade Cuba. Scali replied that he could not speak for the United States, but he carried the message to Roger Hilsman, the State Department intelligence chief. Hilsman passed the offer to Secretary Rusk who called the White House. Rusk then prepared a brief reply which Elie Abel says read as follows:

I have reason to believe that the United States Government sees possibilities in this and supposes that representatives of the two governments could work this matter out with U Thant and with each other. My impression is, however, that time is very urgent.<sup>138</sup>

The message was delivered to Fomin, and about the time Scali returned to the State Department the teletype started chattering Khrushchev's first offer of settlement. It was 6 P.M. Friday.<sup>139</sup>

The text of Khrushchev's letter to President Kennedy of 26 October has never been published. The terms closely paralleled Fomin's offer, but not exactly. Elie Abel tells us that in the letter Khrushchev proposed that if the President would give assurances not to attack Cuba, then there would be no further need to keep Soviet military specialists in Cuba.<sup>140</sup> The EXCOM considered the letter until late that night, but no decision was made on a reply.<sup>141</sup>

On Saturday, October 27th, matters turned for the worst.

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<sup>138</sup>Ibid., p. 177.

<sup>139</sup>Ibid.

<sup>140</sup>Ibid., p. 181.

<sup>141</sup>Ibid., pp. 181-184.

A second offer of settlement was received from Moscow, but this time the ante had been raised. In a tone less conciliatory than the first message, Khrushchev was demanding removal of United States missiles in Turkey in exchange for removal of Russian missiles from Cuba.<sup>142</sup>

The quid pro quo was unacceptable, and in the official reply the White House declared:

It is therefore the position of the United States that as an urgent preliminary to consideration of any proposals, work on the Cuban bases must stop; offensive weapons must be rendered inoperable; and further shipment of offensive weapons to Cuba must cease--all under effective international verification.<sup>143</sup>

Then the EXCOM tried a diplomatic gamble. Ignoring Khrushchev's second letter, it drafted an offer to Moscow which reflected the proposals made in the Scali-Fomin conversation and Khrushchev's first letter. The message was published and delivered to the Russian's at about 7 P.M., that evening. In this letter President Kennedy said:

As I read your letter, the key elements of your proposals--which seem generally acceptable as I understand them--are as follows:

(1) You would agree to remove these weapons systems from Cuba under appropriate United Nations observation and supervision; and undertake, with suitable safeguards, to halt the further introduction of such weapons into Cuba.

(2) We, on our part, would agree--upon the establishment of adequate arrangements through the United Nations to ensure the carrying out and continuation of these COMMITMENTS--(a) to remove promptly the quarantine measures now in effect and (b) to give assurances against an invasion of Cuba. I am confident that other nations of the Western Hemisphere would be prepared to do likewise.

But the first ingredient, let me emphasize, is the cessation

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<sup>142</sup>Letter from Chairman Khrushchev to President Kennedy, October 27, 1962. The Department of State Bulletin, Vol. XLVII (November 12, 1962), 741-743.

<sup>143</sup>White House Statement on Soviet Proposals, October 27, 1962. The Department of State Bulletin, Vol. XLVII (November 12, 1962), 741.



of work on missile sites in Cuba and measures to render such weapons inoperable, under effective international guarantees.<sup>144</sup>

The next day Khrushchev agreed to the terms of settlement and the crisis was over.<sup>145</sup>

### Summary

The quarantine proved to be considerably more successful than had been anticipated. The surprising support given to the United States by the Latin American members of the OAS may very well have reflected a vote against Castro as well as a vote for the United States. With their strong sense of traditional kinship based on personal trust and confidence, the Latin American's must have felt betrayed by Castro's action. To invite the Soviet Union to establish a threat to their security was the ultimate in treachery. The role that the United Nations played in the crisis was also greater. As a place for debate, the rhetorical skill of Adlai Stevenson scored a dramatic victory for the United States. As a place for negotiation, the Acting Secretary General proved to be a useful go-between. While the evidence does not support Richard N. Gardner's claim that U Thant's initiative "helped avoid an armed clash at sea between the Soviets and ourselves;"<sup>146</sup> there is good reason to believe that U Thant's second message was to

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<sup>144</sup>Letter from President Kennedy to Chairman Khrushchev, October 27, 1962. The Department of State Bulletin, Vol. XLVII (November 12, 1962), 743.

<sup>145</sup>Letter from Chairman Khrushchev to President Kennedy, October 28, 1962. The Department of State Bulletin, Vol. XLVII, (November 12, 1962), 743-745.

<sup>146</sup>Richard N. Gardner, "The United Nations in Crisis; Cuba and the Congo, The Department of State Bulletin, Vol. XLVIII, (April 8, 1963), 478.

some degree instrumental in freezing the situation while diplomacy took over. On this same point, it is recalled that the EXCOM had desired to obtain OAS approval in order to give the quarantine force an appearance of legitimacy. This raises the question: How much influence did this factor exert on Khrushchev's decision not to challenge the line of ships? Probably not much. It seems unrealistic to assert that the action of turning away could be interpreted as a "recognition by the Soviet Union of the legal validity of the quarantine."<sup>147</sup> However, the blessings of the OAS possibly did convince the Soviet leaders that there was no hope of bringing moral pressure to bear on the United States. In the Soviet decision on how to deal with the quarantine, Mr. Arnold L. Horelick of the Rand Corporation provides a very cogent summarization:

The Soviet leaders essentially had three choices, all of them unpleasant, and one of them quite dangerous:

(1) They could submit to the quarantine by permitting their vessels to be stopped, searched, and if they carried contraband, to be siezed; or

(2) they could avoid a showdown by keeping their ships out of the quarantine area--which, with the exception of an oil tanker clearly identifiable as such, is what they actually did; or

(3) they could precipitate the use of violence by attempting to violate the quarantine, perhaps with the aid of submarines. Soviet prospects for success in such an undertaking were very poor; and the outlook could not have appeared any brighter to them at any of the successively higher local levels.<sup>148</sup>

Finally, as a result of mutual concessions and compromises, an agreement was reached which made it possible to remove the tension and

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<sup>147</sup>Mallison, op. cit., p. 391.

<sup>148</sup>Horelick, op. cit., pp. 385-386.

to normalize the situation. Kennedy for his part perceived that Khrushchev would have to react to any attack on Cuba. As he later confided to Arthur Schlesinger, Jr., "If we had invaded Cuba . . . I am sure the Soviets would have acted. They would have to, just as we would have to. I think there are certain compulsions on any major power."<sup>149</sup> Likewise, Khrushchev believed that if he did not remove the missiles, the United States would do so forcibly in which case he would be faced with another set of equally undesirable alternatives: the loss of the only Communist state in the Western Hemisphere and the risk of general nuclear war.<sup>150</sup> We can probably take at face value Khrushchev's statement of 12 December 1962 that "immediate action was required to prevent the attack on Cuba" when he "received information from Cuban comrades and from other sources on the morning of October 27 directly stating that this attack would be carried out in two or three days."<sup>151</sup> On October 28, his message of acceptance was received.

<sup>149</sup>Schlesinger, op. cit., p. 691.

<sup>150</sup>In regard to the role played by the danger of general war in Khrushchev's decision to withdraw Soviet strategic weapons from Cuba, Secretary McNamara testified before a subcommittee of the House Committee on Appropriations in February 1963: ". . . we had a force of several hundred thousand men ready to invade Cuba . . . had we invaded Cuba, we could have been confronted with the Soviets . . . had we been confronted with the Soviets we would have killed thousands of them . . . had we killed thousands of them the Soviets would probably have had to respond . . . they might have had nuclear delivery weapons there that might have been operational and they might have been launched . . . in any event, Khrushchev knew without any question whatever that he faced the full military power of the United States, including its nuclear weapons . . . we faced that night the possibility of launching nuclear weapons and Khrushchev knew it, and that is the reason, and the only reason, why he withdrew those weapons." p. 31.

<sup>151</sup>"The Present International Situation and the foreign policy of the Soviet Union." Report by Comrade N. S. Khrushchev at Session of U.S.S.R. Supreme Soviet Dec. 12, 1962 (Pravda, Dec 13, pp. 1-5; Izvestia, pp. 1-4). The Current Digest of the Soviet Press, Vol. XIV, No. 51 (Dec 18-24, 1962), p. 5, cl. 2.

## CHAPTER IV

### UNFINISHED LEGALITIES

The purpose of this chapter is to describe and analyze how the United States legal spokesmen attempted to bring the quarantine into conformity with Chapter VIII of the United Nations Charter.

#### I. BYPASSING ARTICLE 53(1)

##### The Problem with Article 53(1)

If it is assumed that the quarantine was enforcement action, the principal problem that Article 53(1) presented to the United States legal case was that the Security Council never expressly authorized the quarantine prior to its execution. Under these circumstances, the quarantine amounted to a prima facie violation of the United Nations Charter.

Article 53(1) is a part of Chapter VIII of the United Nations Charter. Its purpose, when read in conjunction with the other provisions of the same chapter, especially Article 52(1),<sup>152</sup> is to control the use of coercive force by regional agencies. This is accomplished by the requirement that Security Council authorization must be obtained prior to taking any enforcement action. As viewed from the regional agency,

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<sup>152</sup>Article 52(1) states: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

Article 53(1) is a switch with the Security Council in control of the lever. Until approval is given, enforcement action is theoretically prohibited.

The Tactics Employed to Bypass Article 53(1)

To eliminate the above described difficulty and thereby bring the quarantine into conformity with Chapter VIII of the Charter, the United States legal spokesmen chose to attack the concept of Article 53(1) in two ways: First, they argued that even though authorization might be required, it need not be given prior to execution, nor explicitly expressed. If these two points were conceded, then it could be claimed that there was Security Council authorization. Second, they contended that Security Council authorization was not required in any case, since the quarantine was not enforcement action. In other words, these two lines of argument amounted to saying that authorization was not required, but that just in case it might be, it could be given after the fact.

The official version of the argument was presented by Leonard C. Meeker, Deputy Legal Adviser, Department of State.

Argument that Prior Approval is not Required. "It should not be assumed that 'authorizations of the Security Council' automatically and necessarily means prior authorization,"<sup>153</sup> Mr. Meeker argued. Citing a 1960 case in which on Soviet request the Security Council had met to consider economic and diplomatic measures voted against

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<sup>153</sup>Meeker, op. cit., p. 520

the Dominican Republic by the OAS,<sup>154</sup> he drew attention to the fact that "the U.S.S.R. had asked the Council to approve these measures after they had been taken."<sup>155</sup> "The Soviet theory," he went on to say, "quite evidently was that the Council could appropriately give its 'authorizations' after the fact."<sup>156</sup>

Critique. The first thing striking about the above argument is that since the measures discussed did not involve the use of force, its relevancy to the quarantine is not immediately apparent; moreover, a close examination of the case cited by Mr. Meeker is revealing. The objective of the Soviet delegate was to graciously give on one hand while taking away with the other in an effort to collar the regional organization. The United States representative, Mr. James Wadsworth, saw the true intent of the Soviet delegate's move and vigorously resisted the efforts to bring the Soviet resolution to a vote, stating that:

It is significant that no member of the Organization of American States sought authorization from the Security Council, under Article 53, for the steps taken in connection with that resolution and that, in specifically deciding that the resolution should be transmitted to the Security Council, only for its full information, the Foreign Ministers were clearly expressing their view that this action required only notification to the United Nations under Article 54.<sup>157</sup>

Following this, the United States joined with other members of the OAS sitting on the Security Council, Argentina and Ecuador, and sponsored

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<sup>154</sup>See U.N. Security Council, Official Records, 893rd Meeting, p. 2ff. (Sept. 8, 1960). (Hereinafter referred to as Dominican Case, 1960).

<sup>155</sup>Meeker, loc. cit.

<sup>156</sup>Ibid.

<sup>157</sup>Dominican Case, loc. cit.

their own draft resolution. This is the resolution that was finally passed:

The Security Council,

Having received the report from the Secretary General of the Organization of American States transmitting the Final Act of the Sixth Meeting of Consultation of the Ministers of Foreign Affairs for the American States (S/4476)

Takes note of that report and especially of resolution I, approved at the aforesaid meeting whereby agreement was reached on the application of measures regarding the Dominican Republic.<sup>158</sup>

Recalling that Mr. Meeker inferred that the above case had established a precedent which could be used to claim that prior authorization was no longer required, it is apparent that this was not the conclusion of Security Council. The Soviet "theory," as Mr. Meeker calls it, was defeated, and no such precedent was established.

Argument that Express Approval is not Required. In support of the contention that express approval was not necessary, Mr. Meeker called attention to the fact that during the missile crisis the Security Council was deadlocked. Arguing that "if in the past the abstention or even the absence of a permanent Member from the Council has been held sufficient to supply the concurring votes of the permanent Members' . . . might it not equally be thought that the Council's course of action . . . could constitute such authorization,"<sup>159</sup> since "the Council let the quarantine continue rather than supplant it"<sup>160</sup> while the parties negotiated, he concluded that "authorization may be said to have been granted by the course which the Council adopted."<sup>161</sup>

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<sup>158</sup>Ibid.

<sup>159</sup>Meeker, op. cit., p. 522.

<sup>160</sup>Ibid.

<sup>161</sup>Ibid.

Critique. Apart from the fact that no vote was taken on any resolution, and no one was absent, the weakness of the above argument is in the word "let." The Security Council did not "let" anything happen--it could not have done otherwise. Tacit approval, always a hazard to the party assuming it, can at best only be relied upon when the authorizing agency has discretionary powers, and then chooses to do nothing. In this instance, the Security Council had no such discretion, and if the matter had been pressed, it would have been defeated.

Argument that the Quarantine was not Enforcement Action. In support of this argument Mr. Meeker attempted to use two previous decisions of the Security Council and an advisory opinion of the International Court of Justice (ICJ). The first of these was the Dominican case cited above. With reference to this case he said, "The upshot of the Security Council debate . . . was that the Council rejected the Soviet contention that the measures in question constituted 'enforcement action' requiring 'authorization.'"<sup>162</sup> Next, he referred to the decision of the Council on a Cuban draft resolution requesting that the ICJ, among other things, render an advisory opinion whether "the Organization of American States have the right as a regional agency to take enforcement action . . . without the authorization of the Security Council."<sup>163</sup> In this case, he said, "The Council rejected the contention

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<sup>162</sup>Ibid., p. 520

<sup>163</sup>U.N. Security Council Document, S/5095 (20 March 1962).



that the measures . . . required any authorization by the Council."<sup>164</sup> Lastly, he introduced an advisory opinion of the ICJ. He used this opinion to draw the analogy that since the ICJ had ruled that the measures taken by the General Assembly in the Suez and the Congo were not enforcement action<sup>165</sup> because "they were only recommendatory as to the participating states;"<sup>166</sup> it could likewise be said that the quarantine was not enforcement action since, similarly, the member states of the OAS had not been under any obligation to carry out the quarantine; concluding that "as understood by the United States, 'enforcement action' means obligatory action."<sup>167</sup> Thus, the thrust of the whole argument was, as has been suggested above, that Security Council authorization was not required.

Critique. Mr. Meeker's interpretation of the Dominican case has already been examined and found to be unpersuasive. Likewise, the second Security Council decision that he refers to is no more convincing. In this case, the voting was 7 for, 2 against, with the majority belonging to the Western bloc. It could be argued that this vote reflected a concern to prevent the ICJ from taking up a highly political question; however, the split in the vote seems to deny that suggestion. Whatever the true intent, the effect of the ruling precluded the ICJ from rendering a decision which might appear unfavorable to the OAS members of the voting bloc. Finally, with respect to the ICJ advisory opinion, Mr. Meeker's logic

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<sup>164</sup>Meeker, loc. cit.

<sup>165</sup>Advisory Opinion of the International Court of Justice on "Certain Expenses of the United Nations," 20 July 1962 (ICJ Report 151).

<sup>166</sup>Meeker, op. cit., p. 521

<sup>167</sup>Ibid.

transferring the court's ruling to the missile crisis was also unsound.

Recalling that Mr. Meeker would like us to believe that the advisory opinion provided grounds for claiming that enforcement action which is only recommendatory is not enforcement action, a careful reading of the opinion discloses that the circumstances being considered in that case were very different from the missile crisis.

In the Suez and Congo the ICJ decided that a military force, properly authorized by the General Assembly or the Security Council, with the function of maintaining peace and security in a nation's territory, stationed there with the consent of the receiving state, not temporarily controlling the territory in which stationed, not authorized to take military action against any state, did not constitute enforcement action. The following extracts from the opinion are given in support of this interpretation: (1) as to function, consent, control, and action, the court found that:

The functions of the United Nations Force would be . . . to enter Egyptian territory with the consent of the Egyptian Government, in order to help maintain quiet during and after the withdrawal of non-Egyptian troops, and to secure compliance with the other terms established in the resolution of 2 November 1956.

The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security.

It would be more than an observer's corps, but in no way a military force temporarily controlling the territory in which it is stationed; . . . .

The armed forces which were utilized in the Congo were not authorized to take military action against any state.<sup>168</sup>

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<sup>168</sup>ICJ Report 151, op. cit.

(2) As to the authority for the General Assembly to act in this case, the court held that even though "the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action . . . . the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action"<sup>169</sup> because:

If the word 'action' . . . were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council.<sup>170</sup>

This ruling meant that the General Assembly could not be disbarred from making recommendations for "action" which were not equivalent to coercive or enforcement action.

Comparing the foregoing with the facts of the missile crisis, it is difficult to understand how Mr. Meeker could have interpreted and applied the opinion in the manner in which he did. The provisions of Article 53(1) were not altered by this opinion, and as Mr. Windass illustrates, "a moments reflection would show the absurdity of supposing it otherwise, it is unlikely that the framers of Article 53 intended to say, 'any kind of security action can be taken without Security Council support, provided it is all done voluntarily.'"<sup>171</sup>

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<sup>169</sup>Ibid.

Article 11(2) states: "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

<sup>170</sup>ICJ Report 151, op. cit.

<sup>171</sup>Windass, op. cit., p. 9

### Rationalizing the Bypass

Having destroyed the U.S. legal case, the onus is now on the author to find the U.S. guilty of violating some rule, or legally justified by some authority which has not been made explicit. The choice involved is not a subjective one. Judging by the evidence presented in this paper, the U.S. should have a perfectly legitimate case to agree with a morally right action. But it does not. What kind of approach then is needed to develop the authority, or at least make it obviously clear that were it not for the obstacle of Article 53(1), it would have such authority? One technique may be to derive the OAS's authority through a series of questions and answers.

(1) Where did the OAS derive its authority to approve the use of armed force--meaning quarantine--in this case? Since in Article 1 of the Rio Treaty the High Contracting Parties "undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations" the authority must derive from the U.N. Charter.

(2) Does the U.N. Charter expressly delegate to a regional organization the authority to use armed force? No, but it does provide that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations"(Article 2(4)); and "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention

and removal of threats to peace." (Article 1). Thus if an activity is designed to serve Purpose 1, Article 1, the use of armed force is not violative of Article 2(4).

(3) The OAS can undertake activities in "self defense" as provided in Article 51 or for the "maintenance of international peace and security" in accordance with Article 52(1). Which did it do on this occasion? It chose to exercise its 52(1) authority since paragraph 3 of the Resolution of 23 October stated the intent to report in accordance with the requirements of Article 54 of the U.N. Charter. Article 54 (which is contained in the same chapter of the U.N. Charter as Article 52(1)) requires that the Security Council "shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."

(4) What is left? Article 53(1) which states that "no enforcement action shall be taken under regional arrangements or by regional agencies without authorization of the Security Council." Assuming for a moment that the quarantine is enforcement action, then the whole legal mechanism is derailed because Article 1 cannot be served until authorization is given by the Security Council as required by Article 53(1), but under these circumstances, the Security Council was deadlock. Therefore, is there justification for saying that were it not for the artificial provisions of Article 53(1), the United States and the OAS would have had Article 1 authorization? The answer must be yes because the quarantine was designed to serve Purpose 1, Article 1, of the United Nations Charter.

## II. APPLICABILITY OF TRADITIONAL INTERNATIONAL LAW

### Traditional Blockade

While the United States did not explicitly deny that the quarantine was a blockade in the traditional sense, its representatives asserted as much by alluding to the fact that the rules governing blockade were not applicable because: (1) "there was no assertion of a state of war or belligerency"<sup>172</sup> which is implicit in the rules, and (2) that these rules were developed in the nineteenth century when the problems of international order and state of weapons technology were totally different from today.<sup>173</sup> These arguments are correct. Even a cursory examination of the rules of blockade<sup>174</sup> will confirm that the object of these regulations were to regulate the conduct of war. But war was clearly not the object here; as was evident from the choice of the word quarantine; as was evident from the decision to seek OAS authorization. Likewise, it cannot be asserted that the Soviets hove to voluntarily because they recognized the legality of a quasi-blockade. As has been pointed out, the stakes were much higher than just a couple of ships at sea or a principle of law, even though all of these influences may have played a role. Nevertheless, it simply seems unreal to believe that the Soviets acquiesced because they recognized the legality of the quarantine. Recognizing, as Mr. Chayes said, that "international law addresses different problems today and in different context,"<sup>175</sup> it seems irrelevant to

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<sup>172</sup>Meeker, op. cit., p. 515

<sup>173</sup>Chayes, "The Legal Case for U.S. Action on Cuba," op. cit., p. 763.

<sup>174</sup>Declaration Concerning the Laws of Naval Warfare, op. cit.

<sup>175</sup>Chayes, loc. cit.

to compare the rules of blockade with the characteristics of the quarantine because no conclusive statement could be derived from the exercise. One would find that there were many interesting similarities: appearances, effectiveness, promulgation, etc., yet, no reliable legal argument would be found in the rules of traditional blockade to sustain or attack the legality of the quarantine.

### Pacific Blockade

Another concept in traditional international law is that of pacific blockade. This concept was not applicable in this case since pacific blockade is normally defined as a naval action taking place in peacetime to bring pressure to bear against another nation by preventing the ships of the ships of the blockading and blockaded nation from entering or leaving specified areas of the blockaded nation's coast.<sup>176</sup> Cuba was the blockaded nation but the quarantine was directed against another State.

### III. APPLICABILITY OF OAS RESOLUTION TO THE SOVIET UNION

Leonard Meeker's cogent analysis of this question needs no elaboration and may be quoted verbatim:

The contention has sometimes been made that, while the quarantine of Cuba may have been lawful as between the United States and Cuba, it could not be legally effective as regards countries outside the American Republics, such as the U.S.S.R. To begin with, this contention involves an anomaly not readily to be accepted. It would have us conclude that the quarantine—an application of least force to the situation of clandestine strategic missiles in Cuba—was illegal in its application to Soviet shipping on the high seas (because the U.S.S.R. was not bound by the Rio Treaty), while an air strike or invasion confined to the territory of Cuba would have been legally sanctioned.

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<sup>176</sup>John W. Robertson, "Blockade to Quarantine in International Law," The JAG Journal, Vol. XVII, No. 4 (June 1963), pp. 87-90

But is such an assertion of illegality really sustainable as a proposition of international law? The Rio Treaty created a regional organization to maintain regional peace and security. If its purposes and activities are in conformity with the relevant provisions of the United Nations Charter, extra-hemispheric countries such as the U.S.S.R. are not in a position to attack the organization's activities within the region.<sup>177</sup>

### Summary

The purpose of this chapter has been to describe and rationalize how the quarantine was brought into conformity with Chapter VIII of the U.N. Charter. That this had to be done was due to the provisions of Article 53(1). Because the quarantine had been executed without the Security Council's authorization, the U.S. legal spokesmen's argument was to prove that authorization could be given after the fact, or was not applicable. These arguments were examined and found to be defective, and an alternative method of rationalizing the difficulty was presented and found to be sufficient for sustaining the legality of the quarantine. Matters of traditional international law were considered and found to be largely inapplicable.

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<sup>177</sup>Meeker, Op. cit., pp. 517-518



## CHAPTER V

### CONCLUSIONS

The purpose of this research paper was to analyze the United States justification for the Cuban quarantine to determine: (1) how it was developed; (2) how well it sustained the legal validity of the quarantine; and (3) what precedent, if any, it established in international law.

The hypothesis of this paper was that the United States justified the quarantine as a regional peace keeping operation under OAS authorization for the following series of reasons: (1) it was faced with an unprecedented threat to its security that required removal; (2) the removal could only be accomplished by the threat or use of force; (3) the United Nations could not have brought force to bear to relieve; (4) the United States could bring force to bear in the form of a quarantine; (5) the United States desired to legitimize the use of force in order to improve the probability of acquiescence; (6) the United States also desired to avoid Article 51 as authority for the quarantine so as not to set a precedent.

It is believed that the results of this study has verified the hypothesis, and fulfilled the purposes with the exception of precedents which will be discussed below.

The following constitutes the major findings and resultant precedents which were determined from this research:

### Legality of the Quarantine

The analysis has shown the critical place that Article 53(1) occupied in deciding whether the quarantine was legal or illegal. Realistically appraising that Security Council authorization would not be forthcoming due to the potential of the Soviet veto, the U.S. legal spokesmen argued that such authorization could be given after the fact, or was wholly not applicable. Their arguments were found to be unconvincing; yet, this did not mean the quarantine was illegal, or that the United States had violated some provision of the U.N. Charter. It was shown that a perfectly legitimate case could be made for the quarantine action by a reexamination of the fundamental purposes of the United Nations. Showing how the primary purpose of the organization was not being served because of an inoperative Article 53(1), the legality of the quarantine was established by arguing for the purpose instead of the rule. This method of proof squared with reality, and "stretched" no rule of law. It affirmed what has long been recognized. That the U.N. Charter does not provide a firm method for resolving great power disputes, and in such cases, to judge whether an action is legal or illegal, one has to look beyond the rules which were designed to operate only under conditions of perfect unanimity.

### Article 51

This article was found to be a primary source of confusion throughout the case. The inherent right of self defense has a great deal of subjective meaning, and the layman is prone to forget the important qualification that the U.N. Charter places on that meaning. However, the

definition of the qualification "armed attack" is by no means agreed upon by those who are professionally qualified to interpret such terms; and as presently written, Article 51 is subject to extreme interpretations. For those who are secure and confident, the tendency would be to a narrow construction in order to hold it as a rule against others. For those who are insecure and nervous, the tendency would be towards a broad construction. Yet, there are hazards either way.

The study disclosed that a precedent was established on the meaning of Article 51 which has been overlooked because it was not made explicitly known as such. President Kennedy's rephrasing of Article 51 was an important indicator of the inadequacy of "armed attack" as the standard criteria for determining when self defense begins.

#### Article 53(1)

This article is in need of revision in order to make it alive again. Unrealistically, it assumes Big 5 unanimity, and in its present form that results in it being a dead letter obstacle. A majority vote provision here would have immediately approved the quarantine, eliminated the question of legality, and still retained a measure of its original concept.

#### Quarantine as a Concept for Future Operations

It is not believed that the quarantine established any kind of "cold war" blockade rule that could be relied upon in the future unless the user is prepared to play for the same stakes.

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